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## Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence

Gerald L. Eichinger

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# **VETERINARY MEDICINE: EXTERNAL PRESSURES ON AN INSULAR PROFESSION AND HOW THOSE PRESSURES THREATEN TO CHANGE CURRENT MALPRACTICE JURISPRUDENCE**

**Gerald L. Eichinger\***

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## I. INTRODUCTION

Veterinary medicine has suddenly found itself the subject of national attention, but not for the reasons it would like. While veterinary medicine stands at the zenith of its ability to provide medical and surgical care for over 143 million dogs and cats nationwide,<sup>1</sup> allegations of veterinary malpractice focus unwelcome attention on the profession.<sup>2</sup> Large damage awards given by courts to pet owners whose animals have been negligently injured or killed by veterinarians have made national news.<sup>3</sup> Although no one alleges an epidemic of negligent conduct by veterinarians, there is arguably an epidemic of interest in claims of veterinary malpractice. In seeking to recognize the financial value of the emotional bond between a pet owner and his or her pet,<sup>4</sup> several states have sought to place caps on non-economic damages that would enable aggrieved pet owners to receive anywhere from \$25,000 to \$250,000 for the wrongful injury or death of a pet.<sup>5</sup> These statutes would have applied to veterinary practitioners.<sup>6</sup> Fortunately, thus far for veterinarians, animals have long been considered property at law,<sup>7</sup> and damages for their wrongful in-

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1. American Pet Products Manufacturers Ass'n., Industry Statistics & Trends, [http://www.appma.org/press\\_industrytrends.asp](http://www.appma.org/press_industrytrends.asp) (last visited Apr. 25, 2006) [hereinafter APPMA].

2. See, e.g., Dawn Fallik, *Vets Fear Costly Lawsuits in Future: Liability in Pa. and N.J. is Limited to Replacing the Pet, but Some States Now Award Money for Emotional Damage*, PHILADELPHIA INQUIRER, July 26, 2004, at B1; Chris Richard, *Number of Malpractice Cases Spikes . . . for Pets*, CHRISTIAN SCI. MONITOR, July 28, 2003, at 2; Anita Hamilton, *Woof, Woof, Your Honor: It's No Joke. Animal Lawsuits are Gaining Respect as Pet Owners Seek Justice for the Ones They Love*, TIME, Dec. 13, 2004, at 46; Jean-Paul Renaud, *Man Hopes to Take Big Bite out of Vets over Dead Dog; Owner of Labrador Seeks \$500,000 from O.C. Animal Hospital with a History of Legal Troubles*, L.A. TIMES, Feb. 8, 2004, at B5.

3. *Supra* note 2.

4. See Sonia S. Waisman & Barbara R. Newell, *Recovery of 'Non-Economic' Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 53 (2001); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dis-mantling the Property Classification of Companion Animals By Statute*, 25 U. HAW. L. REV. 481, 517 (Summer, 2003); Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 539 (Winter, 2004).

5. See, e.g., Or. S.B. 166, 71st Legis. Assemb., 2001 Reg. Sess. (Or. 2001) (proposed up to \$250,000 in non-economic damages); Md. H.B. 907, 416th Gen. Assemb., 2001 Reg. Sess. (Md. 2001) (proposed up to \$25K in non-economic damages); Co. H.B. 03-01260, 64th Gen. Assemb., 1st Reg. Sess. (Co. 2003) (proposing up to \$100K in non-economic damages, bill was result of a pet owner's three year-long crusade after his eleven-year-old already ill dog died after receiving an unneeded rabies vaccination); Mi. S.B. 1379, 91st Legis., 2002 Reg. Sess. (Mi. 2002) (proposing up to \$250K in non-economic damages).

6. See *supra* note 5.

7. See, e.g., *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 560 (Tex. Ct. App. 2004) ("The authorities well settle that dogs are property."); *Gluckman v. Am. Air-*

jury or death have been historically low, generally limited to the market or replacement value of the animal.<sup>8</sup>

### A. *An Economic Survey of the Veterinary Profession*

There are nearly 70,000 veterinarians currently in the United States, 47,000 of whom are engaged in "private clinical practice." Of 47,000 practicing veterinarians, over 35,000 are engaged primarily or exclusively in small animal practice. There are approximately 17,000 small animal practices nationwide, each consisting of an average of two veterinarians.<sup>9</sup> Small animal veterinarians earned an average \$103,108 annually in 2003, up from \$84,477 in 2001.<sup>10</sup> The median small animal gross practice revenue is \$639,000 with a net income of \$195,619.<sup>11</sup> Veterinary practices are concentrated geographically. The distribution of veterinarians by state roughly parallels that of the U.S. population.<sup>12</sup> Approximately half of all veterinarians live in the following nine states: California (5,467), Texas (4,364), Florida (3,466), New York (2,898), Pennsylvania (2,492), Illinois (2,384), Ohio (2,330), North Carolina (2,100) and Michigan (2,033).<sup>13</sup>

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lines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (The few courts that view pets as more than property "are aberrations flying in the face of overwhelming authority to the contrary."); Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct. 1988) ("Under Pennsylvania law, a dog is personal property. . . the measure of damages would be the value of the property. . .").

8. DAVID FAVRE & PETER L. BORCHELT, *ANIMAL LAW AND DOG BEHAVIOR* 233 (Lawyers & Judges Publishing Co., Inc. 1999) ("One factor which has kept the number of [malpractice] lawsuits at a minimum level . . . is the low amount of damages awarded for the injury to animals."); Kenneth D. Ross & Thomas Kanyock, ALDF, *If You Suspect Veterinary Malpractice*. . . , <http://www.aldf.org/packets/malpractice.html> (last visited Apr. 25, 2006) ("The biggest problem with bringing a lawsuit is that, even if you win, you usually do not recover very much money. . . . [A]n animal is viewed as an item of personal property, and most courts limit recovery to the cost of replacing the companion animal with another animal.").

9. AVMA, *Veterinary Market Statistics*, U.S. Veterinarians, <http://www.avma.org/membshp/marketstats/usvets.asp> (last visited Apr. 25, 2006).

10. *Income of U.S. Veterinarians, 2003*, JAVMA, Jan. 15, 2005, at 208. Figures are based on a survey conducted by AVMA of 1,842 private practice veterinarians. *Id.*

11. AVMA, *Veterinary Market Statistics*, *supra* note 9.

12. U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005*, <http://www.census.gov/prod/2004pubs/04statab/pop.pdf> (last visited Apr. 25, 2006). California is the most populous state (35.5 million), followed by Texas (22.1 million), New York (19.2 million), Florida (17 million), etc. The total U.S. population is 291 million. The statistics are for 2003. *Id.*

13. Am. Vet. Med. Ass'n, *AVMA Membership Directory & Resource Manual* 24 (Am. Vet. Med. Ass'n. 2004) [hereinafter 2004 AVMA DIRECTORY].

The size of the companion animal veterinary market is steadily growing.<sup>14</sup> More than 63% of U.S. homes contain at least one pet and 45% of homes own two or more.<sup>15</sup> There are nearly ninety million cats and almost seventy-four million dogs nationwide.<sup>16</sup> There were almost 190 million visits by dogs and cats to their veterinarian in 2001, with pet owners spending nearly \$18 billion on veterinary care, a 250% increase in the last ten years.<sup>17</sup> The average dog sees a veterinarian 1.9 times per year while the average cat visits a veterinarian once a year. Mean annual expenditures are \$178.50 for dogs and \$83.30 for cats.<sup>18</sup> Over the lifetime of a dog or cat, the average owner spends \$12,518 and \$11,625, respectively.<sup>19</sup> Overall, Americans will spend almost \$36 billion on their pets in 2005, up from \$34.4 billion in 2004.<sup>20</sup>

### *B. Veterinary Malpractice – Facts and Figures*

More than 2,000 cases alleging veterinary malpractice are filed in U.S. courts annually. The actual number of claims filed by veterinarians with their malpractice carriers is considered proprietary and is otherwise unknown. Based on data provided by the leading veterinary malpractice carrier, AVMA PLIT, the frequency of claims rose from one claim for every twenty-five veterinarians in 1983, to one claim for every sixteen veterinarians in 1993.<sup>21</sup> At present, AVMA PLIT provides professional liability coverage for approximately 70% of U.S. veterinarians, nearly 31,500 total.<sup>22</sup> A senior executive at ABD Insurance, the second largest veterinary malpractice carrier (covering 80% of California veterinarians, ap-

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14. See AVMA, *U.S. Pet Ownership & Demographics Sourcebook* 31, 34 (2002).

15. See APPMA, *supra* note 1.

16. *Id.*

17. *Id.* at 3.

18. *Id.* at 4.

19. Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 ANIMAL L. 215, 239-40 (2003).

20. *Pet Industry is U.S.'s 7th-Largest Retail Sector*, VET PRACTICE NEWS, May 2005, at 41. In the last ten years, spending on U.S. pets has doubled from \$17 billion in 1994. APPMA, *supra* note 1.

21. Huss, *supra* note 4, at 492. AVMA PLIT is an acronym for American Veterinary Medical Association Professional Liability Trust.

22. Jack R. Dinsmore, DVM, *Veterinary Lawsuits: Trends and Defense Strategies*, 23 THE VETERINARY CLINICS OF NORTH AMERICA: SMALL ANIMAL PRACTICE 1019 (1993). Data obtained from AVMA PLIT's records.

proximately 4,375 total),<sup>23</sup> has also noted that the number of claims is continuing to rise.<sup>24</sup>

Professional insurance consultants report a “dramatic rise in veterinary malpractice claims” as well.<sup>25</sup> One attorney who publishes a newsletter tracking animal-related lawsuits and litigation claims veterinary malpractice litigation has increased over 300% in the last five years.<sup>26</sup>

Veterinary malpractice settlements have been rising as well.<sup>27</sup> A leading animal rights attorney and author notes that when he first started practicing in the 1980s, malpractice awards against veterinarians “rarely exceeded \$1,000.” Today, he reports, “\$10,000 settlements are not uncommon.”<sup>28</sup> Another animal rights attorney agrees, noting that his veterinary malpractice settlements and awards are “absolutely getting higher.”<sup>29</sup> In the late 1990’s, Jury Verdict Research group reported jury awards for animal owners of \$5,000 to \$35,000 over a four year period in California, Alabama, Connecticut, Kentucky, Michigan and Utah.<sup>30</sup>

Veterinary malpractice insurance is not expensive. Minimum coverage for a small animal practitioner (\$100,000 per claim/\$300,000 aggregate) is only \$182 per year. Maximum coverage (\$1,000,000/\$3,000,000) increases the premium to only \$234 per year. Excess professional liability insurance is available as an add-on to those already selecting maximum coverage and extends their protection to \$5,000,000/\$5,000,000 for a total annual cost of \$515.<sup>31</sup> In spite of its affordability, 10% to 20% of veterinarians are without professional liability protection at all.<sup>32</sup>

23. Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 218 (2004). Based on 5,467 California veterinarians. 2004 AVMA DIRECTORY, *supra* note 13.

24. Huss, *supra* note 4, at 492.

25. Jennifer Fiala, *Court Rulings Could Up Ante on DVM Malpractice*, DVM MAGAZINE, available at <http://www.cybersure.com/about.asp?DocID=1795> [hereinafter Fiala, *Court Rulings*], (quoting Dr. William Grant, President Southern CA Veterinary Medical Association., who has consulted on veterinary liability insurance for ten years.).

26. Kate Coscarelli, *Man’s Best Friends and Their Owners Getting Day in Court*, SEATTLE TIMES, June 12, 2005, at A8.

27. Cassie Furtado, *Lawsuits Blame Vets for Harm to Pets*, TAMPA TRIBUNE, May 24, 2003 at Nation/World 1 (citing Stephen Wise, a leading animal rights attorney, author and professor).

28. *Id.*

29. Fiala, *Court Rulings*, *supra* note 25 (quoting Robert Newman, prominent CA veterinary malpractice attorney).

30. Richard Willing, *Under Law, Pets Are Becoming Almost Human*, USA TODAY, Sept. 13, 2000, at A1.

31. AVMA PLIT, *Professional Liability Coverage Certificate Forms* (2005).

32. Green, *supra* note 23, at 176.

A pet owner's cost in bringing a veterinary malpractice case through to a verdict has been estimated at \$20,000<sup>33</sup> to \$25,000.<sup>34</sup> With the likelihood of an award limited to the market value of the injured or deceased animal, pet owners seeking contingent fee representation for allegations of veterinary malpractice have been largely unsuccessful in finding an attorney to take their case.<sup>35</sup> One leading animal rights scholar and attorney turns down twenty prospective cases a week simply because "[t]here's just not enough money out there."<sup>36</sup> In hopes of finding a solution to the present financial gridlock preventing animal owners from bringing veterinary malpractice claims, another animal rights scholar and attorney has called for a legislative \$20,000 sentimental damage cap along with attorney's fees in order to increase pet owners' access to judicial relief.<sup>37</sup> If the animal rights movement is successful at increasing damage awards for wrongful animal injury by case law or statute, particularly in excess of the amount necessary to bring a lawsuit (thereby crossing the threshold to retain a contingent-fee based attorney), then veterinarians should expect a concomitant increase in negligence claims.<sup>38</sup>

### C. *Human Medicine vs. Veterinary Medicine – Perspective and Lessons to be Learned*

Without taking anything away from veterinary medicine and its remarkable accomplishments, there are quantum differences

33. See Furtado, *supra* note 27.

34. Green, *supra* note 23, at 196 n.178.

35. *Id.* at 197 ("Lacking the mere potential to break even, few rational actors choose to pursue malpractice suits against veterinarians.").

36. *Id.* at 197 n.182 (quoting Prof. Gary Francione, leading animal rights scholar and professor).

37. Furtado, *supra* note 27 (citing Kenneth Phillips, a Los Angeles animal rights attorney).

38. See, e.g., William C. Root, 'Man's Best Friend.' *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 444 (2002) ("allowing non-economic damages [for wrongful companion animal loss] would have a substantial effect on the profession . . . [and] increase the number of [negligence] lawsuits filed"); Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 145, 159 (2004) ("If the current trends continue. . . more frequent veterinary malpractice lawsuits, with significant damage awards, will likely continue."). See also David M. Studdert, Michelle M. Mello & Troyen A. Brennan, *Medical Malpractice*, NEW ENG. J. MED., Jan. 15, 2004, at 283-284 ("If the contingency fee expected in the event of a win, discounted by the probability of losing, exceeds the expected litigation costs, the attorney will take the case.").

between human health care and veterinary medicine, and the two disciplines cannot be thought of interchangeably. For example, the cost of U.S. human health care is \$1.4 trillion annually,<sup>39</sup> while Americans spend significantly less, \$32 billion, on their pets annually.<sup>40</sup> Per capita and per pet expenditures are similarly disparate. U.S. health care expenditures per person are \$5,267.<sup>41</sup> U.S. pet owners spend far less every year on veterinary care for their dog and cat, \$178.50 and \$83.30, respectively.<sup>42</sup> Overall, Americans spend over forty times more on human health care as they do on animal health care.<sup>43</sup>

Differences in costs of comparative medical procedures are even more dramatic. For example, a routine spay or neuter can cost anywhere from less than \$100 in a Humane Society, to several hundred dollars at a private veterinary clinic; however, a similar hysterectomy performed by a physician in a hospital is over \$15,000.<sup>44</sup> If the ovaries are removed in a woman, this increases the cost by another \$17,440. In another example of the disparate costs between the professions, consider the difference in cost of an average five day hospital stay in an average veterinary clinic for a medical condition, e.g., gastroenteritis, approximately \$1,000 to \$1,500; however, the same five days in a human hospital, almost \$20,000.<sup>45</sup>

In a further example of the difference in scale between the professions, there are over 870,000 U.S. physicians, nearly three doctors for every 1000 U.S. persons. In addition, 75% of American

39. Christina O. Jackiw, *The Current Medical Liability Insurance Crisis: An Overview of the Problem, Its Catalysts and Solutions*, 13 ANNALS HEALTH L. 505, 513 (Summer 2004).

40. Lianne McLeod, *American Pet Ownership Statistics*, <http://www.exoticpets.about.com/cs/resourcesgeneral/a/petstates.htm> (citing the APPMA) (last visited Feb. 26, 2006).

41. Paul Krugman, *The Medical Money Pit*, N.Y. TIMES, Apr. 15, 2005, at A19. Forty-five percent of this number is spent by the government, primarily via Medicare or Medicaid. *Id.*

42. AVMA PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK 31, 34 (2002).

43. The U.S. human population (291 million) is only approximately twice the dog and cat population (143 million). See *Annual Estimates of the Population for the U.S.*, <http://www.census.gov/popset/states/tables/> (last visited Nov. 7, 2005).

44. Healthcare Cost and Utilization Statistics, 2003 National Statistics-Principal Procedure Only, <http://www.hcup.ahrq.gov/HCUFnet.asp> (last visited Apr. 25, 2006) [hereinafter HCUP]. HCUP is part of the Agency for Healthcare Research and Quality. *Id.* A spay is the removal of the ovaries and uterus from a female dog or cat. The veterinary costs are drawn from the author's professional experience in private practice veterinary clinics in New York and California. By contrast, a hysterectomy is the removal of the uterus, not including the ovaries, in a female person. Hysterectomies are fairly common, with approximately 588,000 procedures performed in 2003. See *id.*

45. *Id.*



physicians are board-certified in at least one specialty.<sup>46</sup> By contrast, there are only 69,000 vets nationwide.<sup>47</sup> That is, three veterinarians for every 6000 pets.<sup>48</sup> Veterinarians also have much less advanced training than do their physician counterparts. Only 11% of U.S. veterinarians are board-certified.<sup>49</sup> While medical principles and many techniques are nearly identical in human and veterinary medicine, the professions are worlds apart economically and statistically.

Notwithstanding their differences, veterinary medicine should seek to avoid the same medical malpractice calamity as has beset human medicine.<sup>50</sup> Prior to 1960, only one in seven physicians was ever sued for malpractice in their career. Today, one in seven physicians is sued for malpractice every year.<sup>51</sup> However, 70% of these claims against physicians will ultimately be dropped, dismissed or result in no payment to the claimant.<sup>52</sup> One of the most important factors in a patient's decision to sue his or her doctor has nothing to do with negligence, but rather his or her doctor's inability to communicate with compassion and concern.<sup>53</sup> Even when a case does go through to a verdict, doctors win 80% of the time.<sup>54</sup> There is no solid, incontrovertible evidence that today's malpractice system deters negligent medical care at all.<sup>55</sup>

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46. American Medical Association, *Physician Characteristics and Distribution in the US*, 2005 Ed. (Highlights at V). There are approximately 291 million people in the U.S. See *Annual Estimates of the Population for the U.S.*, available at <http://www.census.gov/popest/states/tables/> (last visited Apr. 25, 2006).

47. 2005 AVMA, *Membership Directory & Resource Manual*, at vi.

48. See APPMA, *supra* note 1.

49. AVMA, *Veterinary Market Statistics, Veterinary Specialists*, <http://www.avma.org/membshp/marketstats/vetspec.asp> (last visited Apr. 24, 2006).

50. See William R. Brody, *Dispelling Malpractice Myths*, WASHINGTON POST, Nov. 14, 2004, at B7; Lauren Elizabeth Rallo, *The Medical Malpractice Crisis – Who Will Deliver the Babies of Today, The Leaders of Tomorrow?*, 20 J. CONTEMP. HEALTH L. & POL'Y 509 (Summer 2004) ("Skyrocketing medical liability premiums are forcing doctors in high-risk specialty areas, such as obstetrics, to stop practicing medicine.").

51. Dean J. Keriakes & James T. Willerson, *America's Medical Malpractice Crisis*, CIRCULATION, June 22, 2004, at 2939.

52. See Jennifer Barrett, *How to Fix the Medical Liability System*, NEWSWEEK, Feb. 6, 2003.

53. Keriakes & Willerson, *supra* note 51, at 2940; Studdert, Mello & Brennan, *supra* note 38, at 284.

54. Donald J. Palmisano, *Health Care in Crisis*, CIRCULATION, June 22, 2004, at 2933, 2934.

55. Studdert, Mello, & Brennan, *supra* note 38, at 286; see also, Brody, *supra* note 50.

Although many people are deserving of the amounts they receive in malpractice judgments or settlements,<sup>56</sup> there is only a weak correlation between a malpractice claim and negligence.<sup>57</sup> In fact, even where doctors have been found liable for malpractice, it was the severity of patient injury, not whether or not there was actually any negligence, that was determinative.<sup>58</sup> Only 17% of malpractice claims filed against physicians were found to involve underlying medical negligence.<sup>59</sup> Even though most plaintiffs who sue physicians ultimately lose, there are many more people injured by negligent physicians than ever bring claims.<sup>60</sup> The present system of medical malpractice litigation not only does not work, it is rightly called a “lawsuit lottery.”<sup>61</sup>

Defending malpractice claims is expensive. The cost of defending a physician against a malpractice claim is approximately \$30,000 if the case never goes to trial and almost \$95,000 where the case goes to a jury and the doctor prevails.<sup>62</sup> Only 4% of malpractice payments are jury trial verdicts.<sup>63</sup> Currently, some physicians pay nearly \$280,000 per year for malpractice insurance.<sup>64</sup> While increases in physician liability insurance rates are multifactorial,<sup>65</sup> “rising malpractice payments are believed to be the primary contributor to the growth of malpractice premiums.”<sup>66</sup>

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56. TO ERR IS HUMAN 26 (Linda T. Kohn, Janet M. Corrigan, & Molla S. Donaldson eds., National Academy Press 2000) (between 44,000 – 98,000 persons die each year from medical mistakes).

57. See Studdert, Mello, and Brennan, *supra* note 38, at 285.

58. Sarah Domin, *Where Have All the Baby Doctors Gone? Women's Access to Health-care in Jeopardy: Obstetrics and the Medical Malpractice Crisis*, 53 CATH. U. L. REV. 499, 504 (2004). For example, recent studies show that most cases of “birth-related cerebral palsy,” where juries tend to be notoriously sympathetic to plaintiffs, are not the result of obstetrical negligence at all. Brody, *supra* note 50.

59. Studdert, Mello, & Brennan, *supra* note 38, at 285.

60. *Id.* (“Only 2 percent of negligent injuries resulted in claims.”); Brody, *supra* note 50 (90% of “disability-causing malpractice go[es] uncompensated.”).

61. Studdert, Mello, & Brenna, *supra* note 38, at 283.

62. Barrett, *supra* note 52.

63. Amitabh Chandra, Shantanu Nundy, & Seth A. Seabury, *The Growth of Physician Medical Malpractice Payments: Evidence from the National Practitioner Data Bank*, *Health Affairs, Trends-Web Exclusive*, May 31, 2005, at W5-240, W5-243.

64. Joseph B. Treaster & Joel Brinkley, *Behind Those Medical Malpractice Rates*, N.Y. TIMES, Feb. 22, 2005, at C1 (noting that South Florida obstetricians and general surgeons pay nearly \$280,000 per year in malpractice liability insurance).

65. See *id.* (citing insurance industry and financial sources in regard to the “cyclical nature of the insurance business and a drop in insurer’s investment earnings when [financial] markets fell [as] among the strongest forces behind the rise in medical malpractice premiums”).

66. Chandra, Nundy, & Seabury, *supra* note 63, at W5-240; Rallo, *supra* note 50, at 516; Kereiakes & Willerson, *supra* note 51, at 2940.

The average physician malpractice judgment is approximately \$460,000, the average settlement \$260,000.<sup>67</sup> Multiple verdicts exceeded \$50 million in 2002.<sup>68</sup> Nationwide, malpractice coverage costs physicians \$6.3 billion.<sup>69</sup> In an effort to control runaway non-economic damage awards and skyrocketing medical malpractice costs, many states have enacted non-economic damage caps, the most successful of which is California's Medical Compensation Injury Reform Act ("MICRA").<sup>70</sup> Among its many cost-saving provisions, MICRA limited the amount a plaintiff could receive in non-economic damages to \$250,000.<sup>71</sup> The resulting success in decreasing malpractice costs from limiting non-economic damages in the human medical malpractice system strongly suggests that allowing uncapped awards in the veterinary malpractice context would result in substantially increased malpractice costs for veterinarians.

Doctors pass increased malpractice premiums along to their patients.<sup>72</sup> Not only do patients pay higher fees due to doctors' higher malpractice liability premiums, patients pay overall higher fees in having to pay for unnecessary "defensive medicine" as well.<sup>73</sup> Defensive medicine is no myth.<sup>74</sup> Over 90% of physicians practice defensive medicine by "ordering unneeded tests and diag-

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67. Chandra, Nundy, & Seabury, *supra* note 63, at W5-244.

68. Rallo, *supra* note 50, at 516.

69. Editorial, *Save Health Care in Wayne County by Saving Doctors*, DETROIT NEWS, Oct. 28, 2004. The article refers to Wayne County, Michigan. *Id.* In another comparison of the vast difference in scale between human and veterinary medicine, the amount physicians spend every year for malpractice insurance equals 1/3 of the total cost U.S. pet owners pay on veterinary care annually (\$18.2 billion). See AVMA, U.S. PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK, at 3, 5 (2002).

70. Rallo, *supra* note 50, at 516. MICRA was enacted in 1975. *Id.* at 517. Brody, *supra* note 50 ("Malpractice insurance rates are skyrocketing in large part because of the increasing size of malpractice awards."); Kereiakes & Willerson, *supra* note 51 (discussing the cumulative impact of multimillion dollar awards on the cost of public health care).

71. See Rallo, *supra* note 50, at n.79. Non-economic damages were defined as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium. . ." *Id.* (quoting Cal. Civ. Code § 1431.2 (b)(2) (West 2002)).

72. See Brody, *supra* note 50. See also Rita Rubin, *Doctors Act Against Malpractice Premiums*, USA TODAY, Jan. 19, 2004, at 4D (citing one Fairfax, Virginia OB/GYN who charged patients an additional \$5 per visit "office user charge" after her malpractice premiums nearly tripled from \$25,000 to \$68,000 over 2001-2004; another Fairfax OB/GYN charged an additional \$6 to cover his 70% increase in malpractice premiums. Patients have been supportive, but the additional fees are not covered by insurance and may violate health plans' contracts with doctors).

73. See Brody, *supra* note 50.

74. David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, JAMA, June 1, 2005, at 2609, 2612.

nostic procedures and making unnecessary referrals.”<sup>75</sup> Defensive medicine is expensive too, annually costing between \$50 million and \$100 million dollars.<sup>76</sup> Not surprisingly, more money from malpractice claims goes to administrative costs (primarily lawyers) than ever goes to patients.<sup>77</sup> Overall, malpractice costs are estimated at 2% of overall U.S. health costs (\$32 billion annually).<sup>78</sup> In the context of veterinary medicine, this would mean \$360 million dollars in increased costs every year to U.S. pet owners.<sup>79</sup>

Concerns about medical malpractice have a significant psychological impact on physicians.<sup>80</sup> Over half of physicians consciously practice medicine motivated by “an ‘extreme’ or ‘strong’ desire to minimize the possibility of lawsuit.”<sup>81</sup> The constant “legal fear” of being sued has caused physicians to view their patients more as “potential medical malpractice claimants” than persons in need of their expertise.<sup>82</sup> Fear of being sued for malpractice is also deterring potential doctors from entering the field, and one in four doctors presently completing their residency would select another profession than medicine if given the chance.<sup>83</sup> Doctors are avoiding going into high-risk specialties like obstetrics altogether.<sup>84</sup> Two-thirds of physicians in practice would not encourage their sons or daughters to follow them into practice.<sup>85</sup> The message for medical professionals and their patients is clear; increasing malpractice litigation pressure on health professionals

75. *Id.*

76. Brody, *supra* note 50.

77. *Id.* (sixty cents out of every dollar spent in the malpractice system goes to administrative, mostly legal, costs).

78. See Brody, *supra* note 50.

79. See AVMA, U.S. PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK 31, 34 (2002).

80. See, e.g., Kereiakes & Willerson, *supra* note 51, at 2939 (“Fear of litigation pervades all aspects of medical practice. . . [resulting in a] lasting emotional angst.”).

81. See, e.g., *id.*

82. Rallo, *supra* note 50, at 510.

83. Kereiakes & Willerson, *supra* note 51, at 2940 (“Concerns about malpractice pervade residency training programs”).

84. Troy A. Brennan & Philip K. Howard, *Heal the Law, Then Health Care*, WASH. POST, Jan. 25, 2004 (stating that not a single graduate of the University of Maryland School of Medicine chose to specialize in obstetrics, one of the hardest hit specialties in medicine by malpractice claims); Robert E. Cline & Carl J. Pepine, *Medical Malpractice Crisis: Florida's Recent Experience*, CIRCULATION, June 22, 2004, at 2936 (discussing the growing shortage of cardiovascular physicians due to “high and rising malpractice premiums in the majority of our states.”).

85. Press Release, The Doctors Company, *Millions of Americans Have Lost Doctors Because of Liability Fears, Poll Finds*, July 6, 2005, available at <http://sev.prnewswire.com/health-care-hospitals/20050706/NYW03306072005-1.html>.

not only adversely affects present medical care, it adversely affects future medical care as well.

## II. THE EROSION OF COMMON LAW DOCTRINES THAT PROTECTED VETERINARIANS FROM SUBSTANTIAL MALPRACTICE CLAIMS

The economic status of veterinarians and the overall size of the veterinary industry raises the question why veterinary malpractice suits have been relatively uncommon compared to medical malpractice suits. Historically, the answer is straightforward: veterinary medicine has been largely insulated from malpractice claims due to two long-standing and heretofore well-accepted legal doctrines. First, animals have long been considered property at law, both at common law<sup>86</sup> and statutorily.<sup>87</sup> Animals' formal designation as personal property (chattel)<sup>88</sup> traces back to eighteenth century common law and Blackstone, who listed animals as "chattels personal, things movable. . . annexed to or attendant on the person of the owner."<sup>89</sup> Chattel was distinguished from "real property," i.e., real estate or land.<sup>90</sup> Second, as property, the majority of jurisdictions limit damages to the pet's fair market value<sup>91</sup> or "economic damages."<sup>92</sup> A pet owner's non-economic damages (mental anguish, pain and suffering, or loss of compan-

86. See, e.g., *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 700 (1897) ("By the common law, as well as by the law of most, if not all, the states, dogs are so far recognized as property that an action will lie for their conversion or injury."); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1086 (Ill. App. Ct. 1987) ("In the eyes of the law, a dog is an item of personal property."); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 561 (Tex. App. 2004) ("A dog is personal property, ownership of which is recognized under the law.").

87. See, e.g., NEV. REV. STAT. § 193.021 (2004) (adopted 1911); KY. REV. STAT. ANN. § 258.245 (West 2005) (adopted 1954); DEL. CODE ANN. tit. 7, § 1708 (2005).

88. BLACK'S LAW DICTIONARY 229 (7th ed. 1999) (defining chattel as "(M)ovable or transferable property; esp., personal property.")

89. Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOCIAL RESEARCH 539, 542 (1995) (citing WILLIAM BLACKSTONE, 2 COMMENTARIES 387-88).

90. *Id.* See also *Hamby v. Samson*, 74 N.W. 918, 919 (Iowa 1898) ('Chattel' includes [dogs and] all kinds of property except the freehold and things which are a parcel of it.').

91. See *Daughen v. Fox*, 539 A.2d 858 (Pa. Super. Ct. 1988) (holding that owner limited to market value where veterinarian told owner dog swallowed needle and required surgery, but veterinarian mixed up x-ray and dog ultimately died as a result of lead poisoning from bullet wound); *Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. Ct. App. 1995) ("[D]ogs are personal property . . . [and] proper measure of compensatory damages for destroying an animal is the fair market value of the animal").

92. *Hyland v. Borrás*, 719 A.2d 662, 664 (N.J. Super. Ct. App. Div. 1998) (awarding market value of \$500 in addition to \$2,500 for veterinary costs where neighbor's American bulldog trespassed on plaintiff's property and severely injured ten-year old shih tzu. Economic damages were defined as "necessary and reasonable expenses . . . incurred to restore the dog to its condition before the attack.").

ionship) are generally not allowed as compensation for the negligent injury or death of a pet.<sup>93</sup> Until recently, these two doctrines produced nearly negligible damage awards to plaintiffs, usually less than \$1,000.<sup>94</sup>

### A. *Veterinary Malpractice Case Law*

It is well-accepted that animals are property, and when they are wrongfully injured or killed, damages are generally limited to the difference in market value before and after injury.<sup>95</sup> A 1988 Missouri case, *Ponder v. Angel Animal Hosp., Inc.*, is representative of how courts typically respond to veterinary malpractice actions.<sup>96</sup> In *Ponder*, an owner brought her dog in for the limited purpose of grooming. Unfortunately, instead of being groomed, the dog was neutered by mistake. Even though the plaintiff did not want her dog neutered, the court found that the procedure itself did not reduce the dog's value. Noting that "[a]ctionable negligence requires proof that the claimant was injured," the court in *Ponder* awarded the defendant animal hospital a directed verdict and the plaintiff was denied even nominal damages.<sup>97</sup>

Other courts have tried to mitigate the harshness of the common law market value doctrine by allowing recovery of damages for the "actual or intrinsic value" of an animal to its owner where it is wrongfully injured or killed.<sup>98</sup> An early expression of this is found in *Brousseau v. Rosenthal*, where a plaintiff was awarded

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93. Non-economic damages are generally synonymous with an owner's claim for "emotional distress," "mental anguish," "pain and suffering," "loss of companionship" or "loss of consortium." See *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App. 2004) (holding that mental anguish or emotional harm are not allowed for the negligent death of a dog); *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) ("Ohio does not recognize non-economic damages for injury to companion animals."); *Jason v. Parks*, 638 N.Y.S.2d 170, 171 (N.Y. App. Div. 1996) ("[A] pet owner in New York cannot recover damages for emotional distress caused by the negligent destruction of a dog."); *Daughen*, 539 A.2d at 865 ("Under no circumstances, under the law of Pennsylvania, may there be recovery for loss of companionship due to the death of an animal.").

94. See FAVRE & BORCHELT, *supra* note 8; Kenneth D. Ross & Thomas Kanyock, *If You Suspect Veterinary Malpractice*. . . , <http://aldf.org/packets/malpractice.html> (last visited Apr. 24, 2006).

95. See, e.g., *Ponder v. Angel Animal Hosp., Inc.*, 762 S.W.2d 846 (Mo. Ct. App. 1988); *Daughen*, 539 A.2d at 864; *Oberschlake*, 785 N.E.2d 811.

96. 762 S.W.2d 846.

97. *Id.* at 847.

98. See *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980); See also *Animal Hosp. of Elmont, Inc. v. Gianfrancisco*, 418 N.Y.S.2d 992 (N.Y. Dist. Ct. 1979) (awarding dog owner dog's "intrinsic value" of \$200, and upholding veterinarian's bill of \$199 plus \$110 for boarding where a dog abandoned at veterinary hospital was prematurely transferred to animal shelter and euthanized).

\$550 in damages after her eight-year-old shepherd-mix dog died of unexplained causes at a veterinarian's kennel.<sup>99</sup> Recognizing that the deceased mixed-breed dog had no market value, the *Brousseau* court sought to make the plaintiff "whole" by "assess[ing] the dog's actual value to [its] owner," recognizing the dog's "protective value" to its owner and including "loss of companionship" in its "actual value" calculation as well.<sup>100</sup> Even though the dog was relatively old, the *Brousseau* court rejected any depreciation of the dog's value on that basis, declaring that "a good dog's value increases rather than falls with age and training."<sup>101</sup>

In a more recent case, *McDonald v. Ohio State Univ. Veterinary Hosp.*, using similar reasoning to that in *Brousseau*, a court awarded the owner of an eight year old, award-winning German shepherd \$5,000 after her dog was negligently paralyzed in surgery.<sup>102</sup> The *McDonald* court held that where a dog had extraordinary training and accomplishments, "market value" was "merely a guideline" in determining its worth. Using a "more elastic standard . . . of value to the owner," the *McDonald* court took note of the dog's imported pedigree, Schutzhund level III training, and the owner's efforts over two years at rehabilitating the dog. Nevertheless, the *McDonald* court expressly noted that "[s]entimentality [was] not a proper element in the determination of damages caused to animals."<sup>103</sup>

Courts have openly struggled with the seeming harshness in denying animal owners non-economic damages for their own emotional pain and suffering after they have wrongfully lost a loved pet.<sup>104</sup> Nevertheless, after confronting overwhelming precedent

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99. 443 N.Y.S.2d 285.

100. *Id.* at 286. In *Brousseau*, the pet owner boarded her dog at defendant veterinarian's clinic. When she returned, the veterinarian told her the dog had died without reason two days earlier. *Id.* at 285. The client consented to an autopsy, but only "contradictory explanations of the loss" were ever put forth for the dog's death by the veterinarian. The *Brousseau* court clearly was awarding "damages for the emotional value of the deceased pet, noting that the owner was a retired widow who suffered a grievous loss." *Id.* Nevertheless, the court seems to subvert the emotional distress (non-economic) award in the actual value calculation. *Id.* at 286.

101. *Id.* at 287 (quoting *Stettner v. Graubard*, 368 N.Y.S.2d 683, 684 (Town Ct. of Harrison, N.Y., 1976) (awarding plaintiff \$200 for veterinary services arising through defendant's negligence, and finding "purchase price is but one – and not necessarily the most important – factor in determining [a dog's] market value.")).

102. 67 Ohio Misc. 2d 40 (Ohio Ct. Cl. 1994).

103. *Id.* at 42.

104. See *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209 (Mich. App. 2000); *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996); *Harabes v. Barkery, Inc.*, 791 A.2d 1142 (N.J. Super. 2001).

and weighing public policy, courts have for the most part held fast in refusing to grant animal owners emotional damages as a result of wrongful animal injury or death.<sup>105</sup> For example, in *Koester v. VCA Animal Hosp.*, a veterinarian negligently bandaged a dog's neck causing the dog to suffocate and die.<sup>106</sup> The *Koester* court noted that it was "sympathetic" to plaintiff's request to reclassify pets as more than property and also to the "prospect of public perception that Michigan law does not provide a just and fair remedy to pet owners [whose animals are victims of veterinary malpractice]." Notwithstanding its sympathy, the *Koester* court "defer[red] to the Legislature to create such a remedy."<sup>107</sup>

In *Rabideau v. City of Racine*, an off-duty police officer shot his neighbor's dog after it entered his yard and smelled his family dog.<sup>108</sup> The court in *Rabideau* thoroughly analyzed the public policy decisions involved in considering whether or not to award pet owners' emotional damages for the wrongful loss of their pet, noting first that it was "uncomfortable with the law's cold characterization of a dog . . . as mere 'property.'"<sup>109</sup> The court noted that "the victim [dog] . . . is not related to [the plaintiff] as a spouse, parent, child, sibling, grandparent or grandchild."<sup>110</sup> Although the court recognized "humans [can] form important emotional connections that fall outside the class of spouse, parent or child," there was nevertheless a quantum difference between a human victim and a companion animal victim.<sup>111</sup> "Relationships between a victim and a spouse, parent or child. . . are deeply embedded in the organization of our law and society. . . [and are] less likely to be fraudulent and . . . a loss that can be fairly charged to the tortfeasor."<sup>112</sup> Even were the court to recognize such a claim, it feared that it could find little basis for rationally distinguishing other categories of animal companions "because the human capacity to form an emotional bond extends to an enormous array of living crea-

105. See *Rabideau*, 672 N.W.2d 795; *Nichols*, 555 N.W.2d 689; *Harabes*, 791 A.2d 1142.

106. *Koester*, 624 N.W.2d at 210.

107. *Id.* at 211.

108. See *Rabideau*, 627 N.W.2d 795. In *Rabideau*, an off-duty policeman shot and killed his neighbor's dog after it jumped out of his neighbor's truck and came into his yard. The plaintiff pet owner alleges that her dog was just sniffing the officer's family dog, but the police officer contends that his dog was attacked and he shot the dog in defense of his wife, child and dog. *Id.*

109. *Id.* at 798.

110. *Id.* at 801.

111. *Id.*

112. *Id.*



tures.”<sup>113</sup> The *Rabideau* court feared that “were such a claim to go forward, the law would proceed upon a course that had no just stopping point.”<sup>114</sup>

Courts in Iowa and New Jersey have expressed similar concerns about how to objectively analyze non-economic emotional damage claims arising from the wrongful injury of a pet.<sup>115</sup> In *Nichols v. Sukaro Kennels*, experts testified that “where a dog is considered to be a ‘family member. . . , its value is whatever the owners think it is . . . “[even] as high as the national debt.””<sup>116</sup> Citing *Nichols*, a New Jersey appellate court, in *Harabes v. Barkery*, noted the “difficulty in quantifying the emotional value of a companion pet and the risk that a negligent tortfeasor w[ould] be exposed to extraordinary and unrealistic damage claims.”<sup>117</sup> The *Harabes* court cautioned further that, “allowing such claims to go forward would open the floodgates to future litigation . . . placing an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals.”<sup>118</sup>

*Petco v. Schuster* demonstrates the importance of contesting plaintiff’s claims for non-economic damages.<sup>119</sup> In *Petco*, the trial court awarded the plaintiff dog owner almost \$40,000 in a default judgment after her dog escaped from a Petco employee while being groomed and was killed after being hit by a car four days later.<sup>120</sup> Relying on no objective criteria, the deceased pet’s owner in *Petco* originally sought almost \$2 million in total damages – \$645,000 in damages for “mental anguish,” \$280,000 in damages for “loss of companionship,” and \$1,000,000 in “exemplary damages.”<sup>121</sup>

While not giving the *Petco* plaintiff everything she sought, the trial court nevertheless awarded the deceased pet’s owner \$10,000

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113. *Id.* at 802.

114. *Rabideau*, 627 N.W.2d at 798.

115. See *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996); *Harabes v. Barkery*, Inc., 791 A.2d 1142 (N.J. Super. Ct. App. Div.).

116. *Nichols*, 555 N.W.2d at 690 (emphasis added). The *Nichols* court rejected plaintiff’s attempted analogy to a case allowing “intrinsic value” for willful damages to trees (citing *Bangert v. Osceola*, 456 N.W.2d 183 (Iowa 1990)). The court noted that in *Bangert* there was a statute allowing treble damages for “willful” damage to trees; however, there was no applicable statute for dogs. Additionally, the plaintiffs in *Nichols* did not present any evidence of their dog’s value other than as pet. *Id.*

117. *Harabes*, 791 A.2d at 1145.

118. *Id.* See also *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 815 (Ohio Ct. App. 2003) (concurring with public policy reasoning set forth in *Harabes*).

119. 144 S.W.3d 554 (Tex. App. 2004).

120. *Id.*

121. *Id.* at 557.

in damages for "mental anguish and emotional distress," \$10,000 for "intrinsic loss of companionship," and another \$10,000 in "exemplary damages."<sup>122</sup> The pet owner's claims for mental anguish were based solely on her "testimony that she had been 'terror ridden' as she searched for [her dog] because the dog 'had never been out . . . and was likely scared . . .'"<sup>123</sup> The plaintiff pet owner valued her own "anguish" as being worth "between \$1,000 and \$20,000 per day." Even more arbitrary was the reasoning behind the *Petco* plaintiff's \$280,000 claim for "loss of companionship."<sup>124</sup> She asserted that her dog's breed (Schnauzer) lived an average of fourteen years; therefore, she would have to receive an "annual salary increase of \$20,000 . . . to accept a job requiring her to part with her [dog]."<sup>125</sup> In a well-thought out and thorough opinion, the appellate court reversed the entire award for mental anguish, emotional distress, counseling costs, intrinsic value, and exemplary damages, but upheld her request for \$6,750 in attorney's fees.<sup>126</sup>

### B. Exceptions to the Rule

Notwithstanding the overwhelming case law refusing to award pet owners' non-economic emotional damages for wrongful animal loss, there are exceptions that are important to note. For example, in *Campbell v. Animal Quarantine Station*, a nine-year-old boxer died of heat prostration after being left alone with other dogs in an unventilated van.<sup>127</sup> Even though the plaintiffs did not witness their dog's death, the court in *Campbell* awarded them \$1,000 for their "serious emotional distress" resulting from the negligent destruction of their dog.<sup>128</sup>

122. *Id.* at 568. The trial court was skeptical whether any damages were proper at all other than replacement costs; nevertheless, it went ahead and awarded the plaintiff \$30,000 in emotional and exemplary damages anyway. *See id.*

123. *Id.* at 562.

124. *Id.* at 563.

125. *Petco*, 144 S.W.3d at 563. However, the mere fact that the pet owner was able to quantify what she would be willing to accept to give up her dog is in reality an admission of her own view of her dog as property. That is, she is willing to sell or have the dog euthanized for \$20,000. Contrast the fact that it is illegal to sell a human infant (or any human).

126. *Id.* at 568. The trial court also awarded the deceased pet's owner \$500 in replacement costs, \$892 as reimbursement for putting her dog through training school and \$52.40 for a microchip. *Id.* These damages were upheld by the appellate court.

127. *Campbell v Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981).

128. *Id.* at 1068-71 (holding plaintiff need not be a witness to accident to recover for "serious mental distress" when plaintiff is not "able to cope with the mental stress engen-

Florida courts have also allowed plaintiffs to recover damages for emotional distress arising from the wrongful death of their companion animal, as well as punitive damages.<sup>129</sup> In *LaPorte v. Associated Independents, Inc.*, a garbage man maliciously threw a garbage can at plaintiff's dachshund and hit the dog.<sup>130</sup> When the owner heard her dog cry and ran outside, the garbage man laughed and resumed his route. The tiny dachshund died as a result of being struck.<sup>131</sup> In upholding the lower court's compensatory award of \$2,000 and punitive damages of \$1,000, the Florida Supreme Court found that the defendant had acted with "extreme indifference to the rights of [the owner]" and that a jury instruction allowing damages based on the owner's mental suffering was correct.<sup>132</sup> The *LaPorte* court expressly disavowed limiting the pet owner's damages to mere market value, noting that "the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal. . . ." <sup>133</sup>

When a veterinarian failed to return a dog's body to its owner after it died following a routine skin treatment, another Florida court, in *Levine v. Knowles*, relied on *LaPorte* in remanding for reconsideration of punitive damages as well as damages for the owner's mental distress.<sup>134</sup> The *Levine* court held that the veterinarian's action in failing to hold the dog's body for an autopsy (despite the owner's request) resulted in an "unnecessary anguish [for the owner] caused by the willful, wanton, malicious abuse of his dead dog's body."<sup>135</sup> The *Levine* court noted that it was the veterinarian's action in willfully cremating the dog's body to avoid a malpractice claim that merited punitive damages.<sup>136</sup>

In *Knowles Animal Hosp. v. Wills*, a veterinarian left a dog on a heating pad for nearly two days resulting in burns and disfigure-

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dered by such circumstances."). *Campbell* also rejected the defendant's claim that if the plaintiff family was awarded emotional damages, "a plethora of similar cases, many [of] which would strain the imagination . . .," might result. *Id.* at 1071.

129. See *La Porte v. Associated Indeps., Inc.*, 163 So.2d 267 (Fla. 1964); *Levine v. Knowles*, 197 So.2d 329 (Fla. Dist. Ct. App. 1967); *Knowles Animal Hosp., Inc. v. Wills*, 360 So.2d 37 (Fla. Dist. Ct. App. 1978).

130. *Laporte*, 163 So.2d at 268

131. *Id.*

132. *Id.* at 268-69.

133. *Id.* at 268.

134. 197 So.2d 329.

135. *Id.* at 332

136. *Id.*

ment so severe that the dog had to be euthanized.<sup>137</sup> In upholding a lower court verdict of \$1,000 in compensatory damages and \$12,000 in punitive damages, the court found that the veterinarian's neglect in allowing the burn to develop over two days was "of a character amounting to great indifference to the property of plaintiffs" and sufficiently tortious to justify the significant jury award.<sup>138</sup> In addition, the *Knowles* court held that instructing the jury to consider the owner's mental pain and suffering was also proper.<sup>139</sup>

Although New York courts generally follow the common law rule denying emotional damages for pet loss, in *Corso v. Crawford Dog & Cat Hosp., Inc.*, one New York civil court found otherwise, noting that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."<sup>140</sup> The court in *Corso* awarded the plaintiff pet owner \$700 damages for "shock, mental anguish and despondency due to the wrongful destruction and loss of [her] dog's body."<sup>141</sup> *Corso's* award of \$700 was entirely for the owner's emotional distress in finding a cat's body in her dog's casket and being "deprived of th[e] right" to memorialize and grieve over her pet.<sup>142</sup>

### C. Increasing Judicial Recognition of Companion Animal Value

More cases are appearing in the national press highlighting substantial jury awards against veterinary practitioners arising from a pet's loss.<sup>143</sup> The most recent and widely covered case is *Bluestone v. Bergstrom*, where a jury awarded \$39,000 to an

137. 360 So. 2d 37 (Fla. Dist. Ct. App. 1978).

138. *Id.* at 38-9.

139. *Id.* at 38; See also *Johnson v. Wander*, 592 So.2d 1225 (Fla. Dist. Ct. App. 1992) (relying on *Knowles* in holding that punitive damages and emotional distress were up to the jury where a veterinarian allegedly left a dog on a heating pad to long resulting in burns and physical illness).

140. *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (Civ. Ct. 1979). In *Corso*, a veterinarian euthanized a fifteen-year-old poodle at its owner's request. The owner had planned an elaborate funeral; however, when the casket was opened, there was a cat inside rather than the owner's dog.

141. *Id.*

142. *Id.* While *Corso's* language may appeal to popular sentiment about companion animals, its reasoning has been severely criticized by subsequent decisions. See, e.g., *Gluckman v. Am. Airlines, Inc.*, 844 F.Supp. 151, 158 (S.D.N.Y. 1994) ("The *Corso* court provides no legal reasoning why prior precedent should be overruled in categorizing pets as more than property."); See also *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 814 (Ohio Ct. App. 2003) (quoting *Gluckman* in declining pet owner's plea to follow *Corso*).

143. See, e.g., Hamilton, *supra* note 2; Fallik, *supra* note 2.

owner whose dog died of complications from seizures.<sup>144</sup> *Bluestone* was covered by major media outlets almost from its inception, appearing first in a 2001 *Newsweek* article entitled “Good Dogs, Bad Medicine?”<sup>145</sup> In December 2004, *Time Magazine* reported *Bluestone*’s conclusion in an article that said it all: “Woof, Woof, Your Honor: It’s No Joke. Animal Lawsuits are Gaining Respect as Pet Owners Seek Justice for the Ones They Love.”<sup>146</sup> Overall, the *Bluestone* litigation took nearly five years and cost the plaintiff \$375,000.<sup>147</sup> Although the plaintiff’s three year old, mixed-breed dog originally came from an animal shelter at a cost of a mere \$100,<sup>148</sup> after a seven-week trial and one and a half days of deliberation, jurors ultimately awarded the plaintiff \$30,000 for his dog’s “special and unique value,”<sup>149</sup> which, the jury expressly noted, the veterinarian “knew.”<sup>150</sup> In addition, jurors awarded the plaintiff \$9,000 for “unreasonable” veterinary bills, although he spent over \$20,000 in veterinary fees in a 4-month period.<sup>151</sup>

In a more recent case, a cat owner was awarded \$45,000 after her twelve-year old cat was attacked and killed in February 2004 in her own back yard by her neighbor’s dog. The owner of the trespassing dog pled guilty to misdemeanor negligent control of an animal and lost the civil case by default judgment.<sup>152</sup> The award included \$30,000 for the cat’s “special value,” and \$15,000 for the owner’s emotional distress.<sup>153</sup> Even though the defendant did not contest the civil claim, the plaintiff cat owner’s attorney “went to

144. See Hamilton, *supra* note 2. See also Renaud, *supra* note 2.

145. Julie Scelfo, *Good Dogs, Bad Medicine?* NEWSWEEK, May 21, 2001, at 52.

146. Hamilton, *supra* note 2.

147. Renaud, *supra* note 2, at B5.

148. Scelfo, *supra* note 145.

149. Larry Welborn, *Dog Owner Gets \$39,000 in Vet Suit. Jury Finds Negligence in Care of Pet Who Died, Awards ‘Special Value’ to Plaintiff*, ORANGE COUNTY REGISTER, Feb. 21, 2004, at A1.

150. R. Scott Nolen, *California Dog Owner Awarded \$39,000 in Veterinary Malpractice Suit: Jurors Find Dog’s Special Value Far Exceeds \$10 Market Value*, JAVMA NEWS ONLINE, Apr. 15, 2004, <http://www.avma.org/onlnews/javma/apr04/040415e.asp> [hereinafter Nolen, *California Dog Owner*]; Press Release, *In Defense of Animals, Precedent-Setting Ruling Recognizes Animals’ Value: Jury Finds All-Care Vet Guilty of Malpractice* (2004), <http://www.idausa.org/news/currentnews/rookssuit.html>.

151. Nolen, *California Dog Owner*, *supra* note 150.

152. Jessica Blanchard, *Woman Awarded \$45,000 in Cat Death: Damages for Dog Mauling May Be Feline Record*, May, 9 2005, [http://seattlepi.nwsourc.com/local/223447\\_cat09.html](http://seattlepi.nwsourc.com/local/223447_cat09.html).

153. Ass. Press, *Owner Gets \$45,000 for Cat’s Death*, THE DAILY NEWS, May 10, 2005 (citing *Roemer v. Gray*, No. 45-9514 (Dist. Ct. King County, Wash. May 10, 2005)), available at [http://www.tdn.com/articles/2005/05/10/nation\\_world/news04.txt](http://www.tdn.com/articles/2005/05/10/nation_world/news04.txt).

great pains to demonstrate how close [the owner] was to [her cat].”<sup>154</sup>

Other large awards for companion animal loss that have appeared in the national press include a 1997 Kentucky case covered in *Newsweek* where a pet owner was awarded \$15,000 when his dog died after being negligently spayed.<sup>155</sup> In 2000, a southern California judge awarded a plaintiff \$27,699 after her Rottweiler’s teeth were broken and its nails mangled in a surgery gone wrong.<sup>156</sup> The case, *Evers v. Palmer*, was covered in *Newsweek* and *The National Law Journal*.<sup>157</sup> In another case, *Rappaport v. McElroy*, the plaintiff, who was also a lawyer, received a \$15,000 settlement when his exotic serval cat died after being treated with a pesticide intended for use only in cattle.<sup>158</sup> The case was reported as far away as Florida by the *Tampa Tribune* in an article entitled “*Lawsuits Blame Vets for Harm to Pets*.”<sup>159</sup> Not only did the veterinarian apply an insecticide to the cat that was meant for cattle, but after agreeing to perform a postmortem, he “lost” the body as well.<sup>160</sup>

Pending cases are receiving widespread attention as well. A Maryland dog breeder is seeking \$600,000 in a malpractice suit alleging her veterinarian failed to perform a Caesarian-section after she repeatedly requested him to perform surgery because her dog’s breed was “prone to high-risk deliveries.”<sup>161</sup> The breeder also alleged that the veterinarian misdiagnosed the number of puppies in the mother’s uterus.<sup>162</sup> A recent Illinois appellate court allowed a cat owner to sue her veterinarian for \$100,000 based on her deceased pet’s “actual value,” after her cat was attacked and killed by a Rottweiler while boarding at an animal

154. Blanchard, *supra* note 152.

155. Scelfo, *supra* note 145, at 52. See also Huss, *supra* note 4, at 492 (citing Stephanski v. Wimpy, No. 96CI 00118, DEC 261.60 (Ky. Cir. Ct. Apr. 14, 1997)).

156. *Id.* See also Cherie Song, *Pet Deaths Trigger Pain, Suffering Suits: State Legislatures Begin to Enable Plaintiffs to Sue for Punitives and More*, NAT’L L.J. July 14, 2003, at col. 1 (citing *Evers v. Palmer*, No. 773909 (Super. Ct. Orange County 2000)).

157. *Evers v. Palmer*, No. 773909 (Super. Ct. Orange County 2000); Scelfo, *supra* note 145, at 52; Song, *supra* note 156, at 4.

158. Furtado, *supra* note 27, at A1; Huss, *supra* note 4, at 492 (discussing *Rappaport v. McElroy*, No. 95E09139 (L.A. Mun. Ct. (Van Nuys Branch) filed Sept. 25 1995)).

159. Furtado, *supra* note 27, at A1.

160. Adam Karp, *Lex Feles et Canis – Beyond Ferae Naturae: Practicing Animal Law in Washington*, WASHINGTON STATE BAR NEWS, Feb. 2003, available at <http://www.wsba.org/media/publications/barnews/2003/feb-03-beyond.htm>.

161. *On the Docket*, DVM NEWSMAGAZINE, Feb. 1, 2004, at 37.

162. *Id.*

clinic.<sup>163</sup> The court in *Anzalone v. Kragness* noted that where lost pets had no market value, courts allowed owners to prove the pet's "actual value to [the owner] . . . by such proof as the circumstances admit."<sup>164</sup> Even though the court noted that the cat owner's request for \$100,000 was "excessive under . . . existing precedent," determining the value of the deceased cat was ultimately up to the jury and could "include some element of sentimental value. . . ."<sup>165</sup> Another cat owner is presently seeking \$5 million in damages from Air Canada after her cat was lost in transit.<sup>166</sup>

#### *D. Legislative Non-Economic Damage Caps for Companion Animal Loss*

Non-economic damage caps for pet loss are legislative attempts to economically quantify the value of the emotional bond between people and their pets.<sup>167</sup> Confronted with animals' well-accepted and long-standing status as property, legislative caps seek to statutorily circumvent the legal corollary that non-economic damages are generally not available for negligent loss or damage to property such as pets.<sup>168</sup> In the human medical malpractice system, legislative caps have been successful in limiting excessive malpractice awards in human medicine.<sup>169</sup> Although limiting non-economic damages has been successful in reducing

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163. *Anzalone v. Kragness*, 826 N.E.2d 472, 473-474 (Ill. App. Ct. 2005). The lower court dismissed the cat owner's request for damages for infliction of emotional distress and the appellate court upheld the dismissal. The sole issue before the court was whether the deceased cat's owner could proceed at trial with the bare claim that the cat's "actual value" to her was \$100,000. The burden of proof would be on the cat owner to "provid[e] evidence which affords some reasonable basis for ascertaining the 'value to the owner' so as to enable a trier of fact to exercise his or her judgment . . . ." *Id.* at 478.

164. *Id.* at 477 (quoting *Jankoski v. Preiser*, 510 N.E.2d 1086, 1087 (Ill. App. Ct. 1987)) (brackets in original).

165. *Id.* at 477-478 (quoting *Jankoski*, 510 N.E.2d at 1087).

166. Nolen, *California Dog Owner*, *supra* note 150.

167. Valerie Richardson, *Bill Targets Excess Vaccination of Pets; Critics Question Its Effectiveness*, THE WASHINGTON TIMES, Feb. 19, 2003, at A13; Paek, *supra* note 4, at 518-519; Jennifer Fiala, *Drug Industry Lobbies Against Raising Pet Worth*, DVM NEWSMAGAZINE, March 1, 2004, at 1 [hereinafter *Fiala, Drug Industry*].

168. *Daughen v. Fox*, 539 A.2d 858, 864 (Pa. Super. Ct. 1988) ("Under Pennsylvania law, a dog is personal property."); *Lewis v. DiDonna*, 743 N.Y.S.2d 186, 189 (App. Div. 2002) ("Pets are recognized as personal property."; "[L]oss of companionship is not a cognizable cause of action."); *Oberschlake v. Veterinary Assoc.*, 785 N.E.2d 811, 812-814 (Ohio Ct. App. 2003) ("[A]ny dog . . . shall be considered as personal property."; "Ohio does not recognize non-economic damages for injury to companion animals."); *Byszewski*, *supra* note 19, at 223-224; *Waisman & Newell*, *supra* note 4, at 46.

169. *Kereiakes & Willerson*, *supra* note 51, at 2940; *Studdert, Mello, & Brennan*, *supra* note 38, at 288.

human malpractice awards, the contrary could prove true for veterinary medicine. That is, allowing substantial non-economic damage awards for veterinary negligence where they have routinely been prohibited would likely result in substantial increases in veterinary malpractice claims and awards.<sup>170</sup>

At present, those non-economic damage caps in place (Tennessee, Illinois) exempt veterinarians.<sup>171</sup> If legislative caps were to be promulgated in amounts that exceeded a pet owner's cost in bringing suit for veterinary negligence, then contingent-fee plaintiffs' attorneys could suddenly find themselves with a whole new and very lucrative industry: veterinary malpractice litigation.<sup>172</sup> Animal rights scholars admit as much in encouraging veterinary malpractice litigation, "[t]hat's where the substantial dollars could come in."<sup>173</sup>

The first successful legislative action to allow non-economic damages for pet loss occurred in Tennessee in 2000 when Senator Steve Cohen introduced the "T-Bo Act" establishing a \$4,000 non-economic damage cap where a person's dog or cat is killed as a result of the intentional or negligent act of another person or their animal.<sup>174</sup> Senator Cohen sponsored the bill after his own dog, "T-Bo," was attacked and killed by a neighbor's dog.<sup>175</sup> The "T-Bo Act" was initially geographically limited in that it applied only to "incorporated areas of any county having a population in excess of 75,000 [persons]."<sup>176</sup> The Act also exempts veterinary practice by explicitly not "authoriz[ing] any award of non-economic damages in an action for professional negligence against a licensed veteri-

170. See Nunalee & Weedon, *supra* note 38, at 159.

171. TENN. CODE ANN. § 44-17-403(e) (2000); 510 ILL. COMP. STAT. 70/3-06 (2002); 510 ILL. COMP. STAT. 70/16-3 (2002).

172. Editorial, *Pet Law Barks up Wrong Tree*, THE DENVER POST, Feb. 12, 2003, at B6. A plaintiff's cost in bringing a veterinary negligence case through to jury verdict is approximately \$25,000. Green, *supra* note 23, at 196 n.178.

173. See Nunalee & Weedon, *supra* note 38, at 160 ("[V]eterinary malpractice cases could prove potentially as lucrative to attorneys as traditional medical malpractice cases."); Green, *supra* note 23, at 244 ("Capping sentimental damages for veterinary harm at \$25,000 also has been endorsed by leading animal legal advocate Steven Wise . . . as long as attorney's fees could also be awarded . . ."); Huss, *supra* note 4, at 495 ("[W]ith the awarding of higher damages, veterinary malpractice suits become more feasible from an economic perspective for both clients and attorneys . . .").

174. Waisman & Newell, *supra* note 4, at 69-71 (discussing Tennessee's "T-Bo" Act, codified at TENN. CODE ANN. § 44-17-403); Paek, *supra* note 4, at 517.

175. See Paek, *supra* note 4, at 517. Although Senator Cohen successfully sued his neighbor in small claims court for T-Bo's medical bills, he was prevented from suing for his own "emotional distress" because non-economic damages were not available for pet loss in Tennessee.

176. TENN. CODE ANN. § 44-17-403(f) (2000).



narian.”<sup>177</sup> Senator Cohen admitted that the “T-Bo Act” would have never passed had he not yielded to veterinary pressure and explicitly excluded veterinarians from the Act.<sup>178</sup> Non-economic damages are defined under the Act as “loss of reasonably expected society, companionship, love and affection of pet.”<sup>179</sup>

One year after Tennessee promulgated its “T-Bo Act,” Illinois amended its 1973 Humane Care for Animals Act, providing for punitive or exemplary damages of not less than \$500 or more than \$25,000 for “each act of abuse or neglect to which the animal was subjected.”<sup>180</sup> In calculating damages, the Illinois legislature specifically included “emotional distress suffered by the owner.”<sup>181</sup> Veterinarians, humane societies and animal control officers all have immunity “while acting in good faith” under the Humane Care for Animals Act.<sup>182</sup>

Legislatures in other states have sought unsuccessfully to introduce legislation setting non-economic damage limits for wrongful companion animal loss at varying amounts.<sup>183</sup> In 2001, an Oregon state legislator proposed a bill authorizing up to \$250,000 in non-economic damages.<sup>184</sup> The Oregon bill would have explicitly required “[t]he finder of fact [to] consider all evidence of the relationship between the keeper and the companion animal, including but not limited to the . . . special needs or characteristics of the keeper . . .”<sup>185</sup> The provisions regarding companion animal damages were ultimately deleted by a Judiciary Committee amendment.<sup>186</sup>

An unsuccessful 2002 Michigan bill would also have allowed up to \$250,000 in non-economic damages for “loss of [a] domestic companion animal caused by another person’s gross negligence or willful and wanton misconduct.”<sup>187</sup> The bill was introduced by Senator Gary Peters “with hopes that Michigan would join Tennessee in recognizing pets as more than mere personal property.”<sup>188</sup> The Michigan bill had no geographical limitations or vet-

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177. *Id.* § 44-17-403(e).

178. See Green, *supra* note 23, at 167 n.11.

179. TENN. CODE ANN. § 44-17-403(d) (2000).

180. THE HUMANE CARE FOR ANIMALS ACT, 510 ILL. COMP. STAT. 70/16-3 (2002).

181. *Id.*

182. 510 ILL. COMP. STAT. 70/3-06 (2002).

183. Byszewski, *supra* note 19, at 226-230.

184. *Id.* at 229.

185. *Id.* (quoting S.B. 166, 71st Leg. Assemb., Reg. Sess. (Ore. 2001)).

186. *Id.*

187. S.B. 1379, 91st Leg., Reg. Sess. (Mich. 2002).

188. Nunalee & Weedon, *supra* note 38, at 145.

erinary exemptions.<sup>189</sup> A 2002 Maryland House bill would have allowed up to \$25,000 in non-economic damages for intentional acts only, but the bill died in committee.<sup>190</sup> A proposed 2002 Connecticut House bill would have allowed economic and punitive damages for the intentional killing or injury of a pet, but limited punitive damages to no more than the maximum amount allowed in small claims court (\$3,500). The bill was never acted upon and died on the floor.<sup>191</sup>

A 2003 Colorado House bill specifically aimed at veterinarians authorized up to \$100,000 for loss of companionship plus attorney fees, and sought to change the legal status of pets from property to "companions."<sup>192</sup> In its general findings and determinations, the general assembly proclaimed that "companion dogs and cats often are treated as members of a family, and an injury to or the death of a companion dog or cat is psychologically and emotionally significant and often devastating to the owner."<sup>193</sup> The general assembly further noted that "[c]urrent laws fail to make the owner of the injured companion dog or cat whole, and [current laws] do not accurately reflect society's favorable attitude toward companion dogs and cats."<sup>194</sup> The bill was the result of a three year crusade by a retired Colorado millionaire whose eleven year-old dog (that was already ill) died after receiving a rabies vaccine his veterinarian wrongly insisted the dog needed.<sup>195</sup>

The bill created a great deal of national and international attention. Jay Leno skewered Colorado politicians' attempts to classify pets as "companions" in his Tonight Show monologue and even BBC-TV reported on it.<sup>196</sup> *The Denver Post* issued a strongly worded editorial, *Pet Law Barks up Wrong Tree*, vehemently opposing the bill, noting that in Colorado, the statutory limit for a

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189. *Id.*

190. Byszewski, *supra* note 19, at 229 (citing H.B. 221, 416th Gen. Assemb., Reg. Sess. (Md. 2002)).

191. *Id.* (citing H.B. 5571, Reg. Sess. (Conn. 2002)).

192. Richardson, *supra* note 167, at A13 (citing H.B. 03-1260, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003)).

193. See Paek, *supra* note 4, at 518 (quoting H.B. 03-1260, 64th Gen. Assemb., 1st Reg. Sess. (Colo. 2003)).

194. *Id.*

195. Richardson, *supra* note 167, at A13. The veterinarian insisted the dog was due for a rabies immunization every year by law, even though the manufacturer labeled the vaccine for three years and Colorado allowed the three-year vaccine. In addition, the manufacturer cautioned that the vaccine should only be given to healthy dogs.

196. *Id.*

child's wrongful death was only \$45,000.<sup>197</sup> Suggesting a better title for the bill would be, "The Tort Lawyers' Income Relief Act of 2003," the editorial predicted the bill would only encourage frivolous lawsuits and further burden a judiciary "already backlogged for years with civil lawsuits."<sup>198</sup> Other editorials defended veterinarians, seeking to protect them against "greatly expanded liability exposure . . . frivolous lawsuits and the cost of defensive medicine, and hav[ing] their pockets emptied by the high cost of liability insurance."<sup>199</sup> The Colorado Veterinary Medical Association also opposed the bill, warning that veterinarians would "have to pass on to consumers the increased costs of doing business, including time spent responding to frivolous lawsuits and additional diagnostic tests that will now be required to practice defensive medicine."<sup>200</sup> Even gay rights advocates picketed the state Capitol, protesting that the bill gave animals more rights than homosexuals currently had. Overwhelmed by the controversy generated, the bill's sponsor withdrew the bill after the committee refused to hear testimony on it.<sup>201</sup>

Finally, a proactive attempt by the California Veterinary Medical Association ("CVMA") to create a special property classification for pets and allow up to \$25,000 in non-economic damages was defeated only after pharmaceutical company Pfizer and the Animal Health Industry group ("AHI") lobbied behind the scenes in opposition to it.<sup>202</sup> The bill endorsed the emotional value of pets and would have allowed claims based on emotional distress and loss of consortium. Although it would seem that Pfizer and AHI saved California veterinarians from themselves, CVMA's leadership was angry nonetheless, accusing Pfizer and AHI of going behind its back and "creating a fear factor."<sup>203</sup> Pfizer responded that it was only looking out for the profession and that veterinarians and industry "should be working together to oppose unfriendly trends and not try to facilitate them."<sup>204</sup> Pfizer also

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197. Editorial, *supra* note 172, at B6.

198. *Id.*

199. Paul Winston, *Pet-Loss Lawsuits a Dog-Gone Shame*, BUSINESS INSURANCE, Feb. 17, 2003, at 6. See also Editorial, *Changing Status of Pets Likely to Create Problems*, THE PANTAGRAPH (Bloomington, Ill.), Feb. 15, 2003, at A14; Editorial, *Pet Law Digs into Unknown Territory*, FORT COLLINS COLORADOAN, Feb. 14, 2003, at A13.

200. David Hawpe, *Lost in Tall Grass: GOP Wants Pet Owners to Go Fetch in the Courts*, THE COURIER JOURNAL (Louisville, Ky.), Apr. 23, 2003, at A10.

201. Richardson, *supra* note 167, at A13.

202. Jennifer Fiala, *Drug Industry*, *supra* note 167.

203. *Id.*

204. *Id.*

pointed out that “encouraging additional litigation is going to invite increased litigation, especially for veterinarians and companies like ours.”<sup>205</sup> In a recent development, the Council of State Governments adopted a Resolution on Animal Guardianship and Liability Legislation opposing legislative non-economic damage caps as well as guardian statutes, discussed below.<sup>206</sup>

Legislative caps allowing non-economic damages for pet loss are certainly the most efficient way to overcome the “pets are property” paradigm. Plus, there many more pet owners than veterinarians, and they theoretically need only find enough sympathetic legislators to pass such legislation. However, in spite of the loud chorus to the contrary, there is no groundswell from pet owners to statutorily provide windfall damage awards for pet loss. Moreover, if the Colorado experience is any guide, such attempts will be unsuccessful and viewed more as an attempt to provide a regular payday for the animal rights bar and to put the rights of animals above those of people.

### E. The “Guardian Movement” – Sleeping Straw Dogs

While state lawmakers are considering legislation expressly authorizing increased non-economic damage awards for companion animal loss, a more subtle, less confrontational, movement is already making its way across the country – the “guardian movement.”<sup>207</sup> Cloaked in friendly, hard-to-disagree-with language, guardian statutes are proverbial Trojan horses, opening the door for more animal rights legislation to follow.<sup>208</sup> Twelve cities and one state, Rhode Island,<sup>209</sup> have already adopted the definition of “guardian” in local ordinances and statutes,<sup>210</sup> either removing

205. *Id.*

206. THE COUNCIL OF STATE GOVERNMENTS, RESOLUTION ON ANIMAL GUARDIANSHIP AND LIABILITY LEGISLATION, (Sept. 29, 2004), available at <http://www.csg.org/NR/rdonlyres/e4lhyftlmj2mhhg33l3bejshpc5vsywy5ssmxc7iqjyuhjk5vow5pikkwaw3rllbcdpfly7jgsrdvaxn34usswwm3zb/2004@resolution+ag+animal+guardianship.doc>.

207. Jennifer Fiala, *Guardianship Movement Heads into Midwest*, DVM NEWSMAGAZINE, Oct. 1, 2004, at 12 [hereinafter Fiala, *Guardianship Movement*].

208. Fiala, *Drug Industry*, *supra* note 167, at 1; R. Scott Nolen, *State Legislators Oppose Animal Guardianship, Noneconomic Damages Laws*, JAVMA NEWS, Dec. 4, 2004.

209. R.I. GEN. LAWS § 4-1-1(a)(4) (2001).

210. ANIMAL LAW SECTION, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, OWNERSHIP V. GUARDIANSHIP (2005), available at <http://www.nabr.org/AnimalLaw/Guardianship/index.htm>. The cities that have adopted “guardianship” legislation are St. Louis, Missouri; Albany, California; Wanaque, New Jersey; Woodstock, New York; Sebastopol, California; San Francisco, California; Amherst, Massachusetts; Menomonee Falls, Wisconsin; Sherwood, Arkansas; West Hollywood, California; Berkeley, California; Boulder, Colorado. *Id.*

the term "owner" altogether from existing ordinances and replacing it with "guardian,"<sup>211</sup> or allowing "guardian" and "owner" to be used interchangeably.<sup>212</sup> Spearheaded by In Defense of Animals ("IDA"), the "guardianship" campaign is named *They Are Not Our Property, We Are Not Their Owners*.<sup>213</sup>

The animal rights movement rejects the notion that anyone can "own" an animal.<sup>214</sup> In fact, "animal guardians view their companion animals as children, not property."<sup>215</sup> Animal rights advocates argue that since companion animals are considered members of the family, laws transforming animal "owners" into "guardians" better reflect that relationship.<sup>216</sup> A parent does not "own" a child.<sup>217</sup> Therefore, how can a person "own" the dog they consider to be just "like a child?"<sup>218</sup> IDA seeks to raise animals above their status as property to "individuals with needs and interests of their own."<sup>219</sup>

Statute and case law regarding guardianship is extensive and currently limited to persons acting as guardians for other persons.<sup>220</sup> Strictly interpreting existing guardianship law, animal guardians would be trustees of their animal ward.<sup>221</sup> The human guardian would have a fiduciary relationship toward his or her animal ward, obligating the guardian to "work for the [animal] with a single-minded loyalty to the exclusion of all personal gain."<sup>222</sup> Guardians would be held to higher legal standards than

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211. See Paek, *supra* note 4, at 486-87. Boulder, Colorado was the first city to adopt guardian legislation (replacing all references to "pet owner" with "pet guardian") in July 2000. West Hollywood (Feb. 2001) and Berkeley (one week after West Hollywood) were second and third, respectively. R. Scott Nolen, *Owners or Guardians? Cities Change Identity of Pet Owners, Hoping to Promote Welfare*, JAVMA NEWS, April 15, 2001 [hereinafter Nolen, *Owners or Guardians*].

212. R.I. GEN. LAWS § 4-1-1(a)(4). The Rhode Island Veterinary Medical Association ("VMA") was caught off guard by the law. Had its members known the bill was going through the state legislature, they would have fought to block the law. After the bill passed, the Rhode Island VMA increased veterinarian dues to pay for the services of a lobbyist to monitor legislation. Fiala, *Guardianship Movement*, *supra* note 207.

213. R. Scott Nolen, *Owners or Guardians*, *supra* note 211.

214. See, e.g., Paek, *supra* note 4, at 482-83.

215. *Id.* at 486.

216. *Id.* at 483.

217. *Id.* at 486.

218. *Id.* at 483.

219. THE GUARDIAN CAMPAIGN, IN DEFENSE OF ANIMALS, <http://www.guardiancampaign.com/whatDifferenceWord.htm> (Last visited Feb 26, 2006)

220. Duane Flemming, *Ownership of Animals vs. Guardianship of Animals*, CALIFORNIA VETERINARIAN, May/June 2002, at 11.

221. *Id.* at 10.

222. *Id.* at 11.

animal owners are currently, and could be removed if they failed to use ordinary care and diligence in taking care of their animal ward, or were convicted of a felony, or had an interest adverse to that of the animal.<sup>223</sup> Most importantly, by statutorily changing the relationship of people and their companion animals from one of ownership to one of guardianship, animal rights groups are “laying the groundwork for an eventual legal challenge to the legal status of pets as property.”<sup>224</sup>

### III. VETERINARY PRACTITIONERS – SQUARELY IN THE SIGHTS

Veterinarians have traditionally been subjects of interest to society. Until recently, that interest has been overwhelmingly one of respect, and in some cases, approaches worship. In surveys of attitudes toward professionals, veterinarians have always been near the top. Even today, veterinarians enjoy a “Professional Honesty and Ethics” rating of 68% (nurses are highest at 83%; MDs, 68%; lawyers, 16%; car salesmen, 7%).<sup>225</sup> Perhaps the zenith of public respect for veterinarians occurred with the publication of James Herriot’s wildly successful book, *All Creatures Great and Small*.<sup>226</sup> Today, things are different. When veterinarians have appeared in the media recently, it has more often been for malpractice,<sup>227</sup> or money-grubbing,<sup>228</sup> than for being the warm, compassionate, animal healers of James Herriot’s day.

#### A. Media Sensationalism – Throwing Veterinarians to the Wolves

While no one has shown that there is an epidemic of veterinary malpractice, there is certainly considerable media attention.<sup>229</sup> For news media, veterinary malpractice combines two popular subjects; animals and wrong-doing. Although good for

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223. *Id.*

224. R. Scott Nolen, *Pet Owners in San Francisco Become “Pet Guardians,”* JAVMA NEWS, Mar. 1, 2003.

225. THE GALLUP POLL, PUBLIC RATES NURSING AS MOST HONEST AND ETHICAL PROFESSION, Dec. 1, 2003.

226. JAMES HERRIOT, *ALL CREATURES GREAT AND SMALL* (1972).

227. See, e.g., Richard, *supra* note 2, at 2; Scelfo, *supra* note 145, at 52. See also Richard L. Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, THE BRIEF, Spring 2002, at 43.

228. See *CR Investigates: Veterinary Care without the Bite*, CONSUMER REPORTS, July 2003, <http://www.consumerreports.org/cro/personal-finance/pets-vets-703/overview.htm>.

229. See, e.g., Fallik, *supra* note 2, at B1; Richard, *supra* note 2, at 2; Scelfo, *supra* note 145, at 52; Andrew Brownstein, *Law Goes to the Dogs – And Cats*, TRIAL, Feb. 2003, at 14.

news sales, extensive reports of alleged and real negligence profoundly harm veterinarians' reputations. In their "overzealous attitude toward animal rights," news media have substantially overstated the extent and degree of veterinary malpractice.<sup>230</sup>

Widespread reporting of large damage awards for veterinary malpractice creates a perception that professional negligence and substantial damage awards are commonplace, thereby encouraging aggrieved pet owners to bring even more claims.<sup>231</sup> Pet owners come to expect substantial monetary compensation if anything unexpected occurs in the course of their pets veterinary care.<sup>232</sup> As veterinarians' professional image deteriorates in response to unfair media broadcasting, plaintiffs' attorneys are increasingly willing to undertake even more of these cases, thereby increasing the total number of claims.<sup>233</sup> Veterinarians routinely fight hard for their patients' lives, often under substantial economic and technological limitations. When a pet simply succumbs to the inevitable, and the pet owner nevertheless brings suit against the veterinarian, the doctors are left "feel[ing] victimized . . . [and] falsely accused."<sup>234</sup>

In a December 2004 *Time Magazine* article entitled "Woof, Woof, Your Honor: It's No Joke. Animal Lawsuits Are Gaining Respect as Pet Owners Seek Justice for the Ones they Love," veterinary malpractice headed the list of legal actions being filed in increasing numbers by pet owners.<sup>235</sup> The article was concerned with "the growing ranks of animal lovers who are filing lawsuits over their pets."<sup>236</sup> A 2003 *Christian Science Monitor* article put veterinary malpractice front-and-center in *Number of Malpractice Cases Spikes . . . for Pets*.<sup>237</sup> The article focused on animal owners' increasing success in winning emotional damage awards in veterinary malpractice cases. In addition, the article documented a

230. Nunalee & Weedon, *supra* note 38, at 160.

231. Huss, *supra* note 4, at 493.

232. See Huss, *supra* note 4, at 493 n.75 ("[P]eople think that if anything goes wrong they can get significant compensation . . .") (quoting Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 746-47 (1998)). See also Kereiakes & Willerson, *supra* note 51, at 2940 ("[Patients hold] unrealistic expectations of perfection in care and either will not or can not differentiate between 'maloccurrence,' (known as adverse outcome) and malpractice (negligence).").

233. *Supra* note 233.

234. Laura Parker, *When Pets Die at the Vet, Grieving Owners Call Lawyers*, USA TODAY, March 15, 2005, at A1.

235. Hamilton, *supra* note 2, at 46.

236. *Id.*

237. Richard, *supra* note 2, at 2.

growing animal rights movement that ultimately spells trouble for veterinarians, noting victories in the animal "guardian movement," legislative non-economic damage caps, animal-protection laws, and changes in the Uniform Probate and Trust Code.<sup>238</sup> The article cautioned that, if animal rights activists are successful in reclassifying animals as more than property, fears of "a wave of frivolous litigation and increases in the cost of veterinary care" may soon be realized.<sup>239</sup> In "*Vets Fear Costly Lawsuits in Future*," the *Philadelphia Inquirer* further documented veterinary medicine's growing concern with increasing malpractice litigation and legislative non-economic damage caps.<sup>240</sup>

A 2003 *Consumer Reports* article entitled "*Veterinary Care Without the Bite*," excoriated small animal practitioners as money hungry mercenaries, pointing out that consumer spending on veterinary services has nearly tripled in the last twelve years, reaching \$18.2 billion in 2001, and that since 1977, veterinary prices have increased at twice the inflation rate.<sup>241</sup> The article tells its readers that "[v]et charges can . . . be influenced by how much in college loans a newly minted vet has to pay off, how new or fancy the vet's office is, and whether the office. . . is located in a high-rent part of town."<sup>242</sup> Naïve and cynical in its recommendations and conclusions, *Consumer Reports* apparently believes that all animals, diseases and veterinarians are alike and that pet owners need only "shop around" to find the cheapest veterinary care, even in emergency situations.<sup>243</sup> For example, in discussing ruptured knee (cruciate) ligament surgery, *Consumer Reports* notes that while the state-of-the-art surgery (tibial plateau leveling osteotomy) may cost \$2,200, "simply repairing the joint with synthetic material also gets the dog back on its feet. . . for as little as \$40."<sup>244</sup> While veterinary medicine was justifiably outraged at *Consumer Reports*, perhaps some of the article's anger is related to *Consumer Reports'* seven unanswered prepublication requests for information from the American Veterinary Medical Association.<sup>245</sup>

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238. *Id.*

239. *Id.*

240. Fallik, *supra* note 2, at B1.

241. CONSUMER REPORTS, *supra* note 228.

242. *Id.*

243. *Id.*

244. *Id.*

245. See Green, *supra* note 23, at 248 n.474.



## B. The Animal Law Movement

The animal law movement is aimed at protecting animal well-being through the legal process.<sup>246</sup> Of course, not only does the animal law movement advocate for animals, it advocates for animal owners too. In that capacity, the animal law movement has set its sights squarely on veterinary medicine in seeking to increase damage awards for veterinary negligence beyond market value.<sup>247</sup> In just one example, The Animal Law Section of the State Bar of Michigan filed an *amicus* brief in support of awarding substantial damages reflecting the “social and psychological value” of a dog in a veterinary malpractice suit.<sup>248</sup>

Forty-two law schools teach courses in animal law.<sup>249</sup> Even though many people consider their animals family members, they are frustrated when “nothing in the law . . . reflects the role of a pet in the family.”<sup>250</sup> Eleven state bar associations and the District of Columbia have animal law committees, and two more are in the process of being formed.<sup>251</sup> Further, there are seven local bar animal law sections or committees.<sup>252</sup> The 400,000 member American Bar Association recently announced the creation of an Animal Law Committee.<sup>253</sup> One of the most important issues mentioned in the ABA’s “Letter from the Chair” is providing “com-

246. See, e.g., Patricia Collier, ‘Animal Law’ Comes into Its Own, ANIMAL NEWS, Feb. 14, 2004, <http://www.buzzle.com/editorials/2-14-2004-50548.asp>.

247. See *id.*; Catherine L. Wolfe, *The Annual Report of the Animal Law Section of the State Bar of Michigan* (1999), <http://www.michbar.org/journal/article.cfm?articleID=138&volumeID=12> (last visited Apr. 24, 2006). Kara Spak, *Do They Need a Good Lawyer?*, CHI. DAILY HERALD, Feb. 16, 2005, at 1.

248. Wolfe, *supra* note 248 (referring to *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209 (Mich. Ct. App. 2000)).

249. National Association for Biomedical Research, Animal Law Section, Animal Law Courses/Seminars, <http://www.nabr.org/animallaw/animallawcourses.htm> (last visited Apr. 24, 2006).

250. Patricia Collier, *Animal Law Field Grows*, ANIMAL LEGAL DEFENSE FUND, February 9, 2004, <http://www.aldf.org/article.asp?cid=305>.

251. National Association for Biomedical Research, Animal Law Section, <http://www.nabr.org/animallaw/statebars.htm> (last visited Apr. 24, 2006). Arizona, Connecticut, Florida, Michigan, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Texas, Washington and Washington, D.C. already have animal law committees or sections, and Massachusetts and Oregon are in the process of forming animal law sections or committees. *Id.*

252. National Association for Biomedical Research, Animal Law Section, Animal Law Sections/Committees in Local/Regional Bar Associations, <http://www.nabr.org/animallaw/bars/regionalbars.htm> (last visited Apr. 24, 2006). Chicago, Kansas City, Los Angeles, New York City, San Diego, St. Louis and Tulsa have local animal law sections or committees.

253. American Bar Association, Animal Law Committee, [www.abanet.org/tips/animal](http://www.abanet.org/tips/animal) (last visited Apr. 24, 2006).

pensation beyond fair market value when an animal is [injured or] killed.”<sup>254</sup>

The nation’s top law schools are receiving substantial endowments to support teaching and research in animal law.”<sup>255</sup> Recently, the UCLA School of Law received a \$1,000,000 gift from the Bob Barker Endowment Fund for the Study of Animal Rights.<sup>256</sup> Mr. Barker, the long-time host of the “The Price is Right,” is a committed animal philanthropist, in 1995 establishing a \$25 million foundation to fund spay/neuter clinics. Mr. Barker has established one million dollar endowments to study animal rights law at Harvard, Stanford, Columbia and Duke, and similar gifts are being considered for Northwestern University and the University of Michigan.<sup>257</sup> Mr. Barker wants to “train a generation of lawyers, judges and legislators in animal rights and the widespread problems of cruelty and neglect.”<sup>258</sup> In addition, “some of these lawyers are going to become politicians.”<sup>259</sup> His major goal is to “enact more stringent legislation to protect [animals] and to really effectively enforce the laws that we already have on the books.”<sup>260</sup>

For the last ten years, there has been a law journal devoted to and entitled “*Animal Law*,” sponsored by the Animal Legal Defense Fund and centered at Lewis & Clark Law School in Portland, Oregon.<sup>261</sup> Contributors to the journal have included former U.S. Attorney General Bruce Babbitt, Senator Mark Hatfield, the world famous primatologist Dr. Jane Goodall, constitutional law scholars Laurence Tribe and Cass Sunstein, and many animal law professionals and students.<sup>262</sup> A second journal devoted to animal law, *Journal of Animal Law*, began in Spring 2005 at Michigan

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254. Letter from Sandra R. McCandless, Chair, Tort Trial & Insurance Practice Section, to Colleague, Sept. 15, 2005, available at <http://www.abanet.org/tips/market/alclletter.html>.

255. See, e.g., Harvard Law School, *HLS Receives Gift to Study Animal Rights Law*, <http://www.hno.harvard.edu/gazette/2001/07.19/18-bobbarker.html>. (last visited Apr. 24, 2006). See Collier, *supra* note 251.

256. Nick Madigan, *Enlisting Law Schools In Campaign For Animals*, N.Y. TIMES, Nov. 27, 2004 at B7.

257. *Id.*

258. *Id.*

259. *Id.*

260. Douglas Belkin, *Local Advocates Join Legal Movement to Help Animals*, BOSTON GLOBE, Mar. 3, 2005.

261. Richard J. Katz, *Origins of Animal Law: Three Perspectives*, 10 ANIMAL L. 1, 2 (2004).

262. *Id.* at 2-3.

State University College of Law.<sup>263</sup> A third journal also devoted exclusively to animal law, *The Journal of Animal Law and Ethics*, will begin publication in 2006 at the University of Pennsylvania Law School.<sup>264</sup>

The animal law movement is likely to have a profound impact on veterinary medicine.<sup>265</sup> Its determination to put legislation and/or case law in place, thereby enabling pet owners to receive substantial non-economic "emotional" damages for pet loss, is aimed squarely at veterinary practitioners. Apparently, veterinary medicine does not realize the danger that the animal law movement poses to the profession. A recent article in the Journal of the American Veterinary Medical Association reported on a joint Animal Legal Defense Fund ("ADLF") and Yale Law School conference and proclaimed with apparent acquiescence that "*Now, It's the Lawyers' Turn.*"<sup>266</sup> Unless veterinarians are so myopic that they choose to ignore the effect that "jackpot" non-economic damage awards have brought to the human medical field, they would be wise to call their members to battle stations instead of assuming the role of passive bystander.<sup>267</sup>

### C. *Animal Law Scholarship 2004 – Focus on Veterinary Malpractice*

Animal rights commentators have taken a particular interest in veterinary malpractice and are increasingly frustrated with the status quo. Three major law review articles devoted to veterinary malpractice appeared in 2004, two of which were published in *Animal Law*.<sup>268</sup>

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263. *Journal of Animal Law*, <http://animallaw.info/policy/pojouranimlawinfo.htm>, (last visited Apr. 24, 2006).

264. *Journal of Animal Law and Ethics*, <http://www.law.upenn.edu/groups/jale>, (last visited Apr. 24, 2006).

265. See *id.* (arguing that "companion animals have social and psychological value for which their owners deserve compensation beyond the animals' status as personal property"); Patricia Collier, *Animal Law Comes Into Its Own*, <http://www.buzzle.com/editorials/text2-14-04> ("Animal law will also play a part as current laws are challenged by the public, such as how much to allow for damages in a veterinary malpractice suit."); Stephanie Davis, *Demand for Animal Law Courses Escalating*, DVM NEWSMAGAZINE, Oct. 1, 2003 (quoting veterinarian-attorney and consultant, Charlotte LaCroix, DVM, Esq., "This movement will have a direct impact on veterinarians' relationship with clients and their relationship with animals. . .").

266. R. Scott Nolen, *'Now It's the Lawyers' Turn.' Animal Rights Moves into Courts, Legislatures*, J. AM. VET. MED. ASS'N, Mar. 1, 2005, <http://www.avma.org/onlnews/javma/mar05/050301d.asp> [hereinafter Nolen, *Lawyers' Turn*].

267. See Barrett, *supra* note 52; Brody, *supra* note 50.

268. See Green, *supra* note 23; Nunalee & Weedon, *supra* note. 38; Huss, *supra* note 4.

In *The Future of Veterinary Malpractice Liability in the Care of Companion Animals* ("Veterinary Malpractice Liability"), the author argues against the current "legal absurdity of allowing veterinarians to exploit companion animals' value at the cash register, and pretend this value does not exist in the courtroom" when pet owners bring claims of professional negligence.<sup>269</sup> *Veterinary Malpractice Liability's* solution is to enact legislative non-economic damage caps of \$25,000.<sup>270</sup>

Echoing the above, Professor Rebecca Huss, in *Valuation in Veterinary Malpractice*, argues that "[v]eterinarians [who] emphasize the importance of the human-animal bond . . . should not be able to then argue that the bond is irrelevant when it is time to determine damages in malpractice actions."<sup>271</sup> *Valuation in Veterinary Malpractice* also endorses a cap of \$25,000 on non-economic damages for wrongful companion animal injury or death.<sup>272</sup> Professor Huss notes that such caps would create essentially a "new remedy" for companion animal loss in most states since most states heretofore do not allow non-economic damages for pet loss.<sup>273</sup>

*Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, the third law review article appearing in 2004 devoted particularly to veterinary malpractice, was co-authored by both an attorney and a veterinarian.<sup>274</sup> The authors of *Modern Trends in Veterinary Malpractice* do not explicitly endorse non-economic damage caps, but they do predict that, "reflecting general societal attitudes, legislatures across the nation are likely to continue in this trend."<sup>275</sup> They also predict that "[i]f huge damage awards become the norm, then veterinary malpractice insurance premiums may increase so dramatically that veterinarians are forced to pass the increase on to their human clients, thereby resulting in fewer people seeking veterinary assistance for their animals. . . ."<sup>276</sup> The

269. Green, *supra* note 23, at 233.

270. *Id.* at 244, 249.

271. Huss, *supra* note 4, at 531.

272. *Id.* at 532, 539.

273. *Id.* at 538. See also Green, *supra* note 23, at 201 ("[T]he market value limitation economically obstructs legal access for plaintiffs seeking compensation for veterinary mistakes.").

274. Nunalee & Weedon, *supra* note 38. Ms. Nunalee is an Animal Legal Defense Fund attorney and adjunct lecturer in animal law. Dr. Weedon is a senior partner in a veterinary practice and also an adjunct lecturer on the human-animal bond. *Id.* at 125 n.a1-aa1.

275. *Id.* at 145.

276. *Id.* at 160.

authors also predict that “veterinary malpractice cases could prove potentially as lucrative to attorneys as traditional medical malpractice cases.”<sup>277</sup>

#### *D. Animal Rights Groups – Biting the Hand that Heals Them*

The idea of animal “rights” refers to those “inalienable entitlements” that animals are born with and serve to protect them against the needs, wants, and interests of society. Save for various anti-cruelty laws, companion animals currently have no discernable legal rights.<sup>278</sup> Animal rights activists, led by Tom Regan who wrote the landmark 1983 book, *The Case for Animal Rights*, seek the “total abolition of the use of animal research; the total dissolution of commercial animal agriculture; and the total elimination of commercial and sport hunting and trapping.”<sup>279</sup> Animal rights activists also seek to remove animals’ classification as property and to ultimately achieve “standing” for animals so they can bring legal actions on their own behalf.<sup>280</sup> Nationwide, there are presently 5,000 animal rights organizations.<sup>281</sup> People for the Ethical Treatment of Animals (“PETA”) is the largest animal rights group world-wide, relying on more than 850,000 members and volunteers and \$28 million in annual donations to promote its multi-pronged agenda of vegetarianism, ending factory farming, the wearing of fur, and ending the use of animals in medical research and entertainment.<sup>282</sup>

Some animal rights groups are devoted solely to litigation on behalf of animals. For example, The Animal Legal Defense Fund (“ALDF”) has over 100,000 members, has been in existence more than twenty-five years and is dedicated to “end[ing] the abuse and cruelty that result from animals’ classification as property.”<sup>283</sup>

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277. *Id.*

278. JOSEPH LUBINSKI, INTRODUCTION TO ANIMAL RIGHTS (2d ed. 2004.), <http://www.animallaw.info/articles/ddusjlubinski2002.htm> (last visited Apr. 24, 2006).

279. TOM REGAN, THE CASE FOR ANIMAL RIGHTS, [http://tomregan-animalrights.com/regan\\_rites.html](http://tomregan-animalrights.com/regan_rites.html) (last visited Apr. 24, 2006).

280. JOSEPH LUBINSKI, LEGAL OVERVIEW OF ANIMAL RIGHTS, <http://www.animallaw.info/articles/qvusjlubinski2002.htm> (last visited Apr. 24, 2006). *See also* In Defense of Animals, *The Guardian Campaign: Respecting Our Animal Friends*, <http://guardiancampaign.com> (creating a “nationwide platform to reflect growing public to [sic] support for a redefined public standard of relating to animals”) (last visited Apr. 24, 2006).

281. Nolen, *Lawyers’ Turn*, *supra* note 266.

282. People for the Ethical Treatment of Animals, *PETA’s Mission Statement*, <http://www.peta.org/about/index.asp> (last visited Apr. 24, 2006).

283. Animal Legal Defense Fund, *ALDF: The Defense Never Rests*, <http://aldf.org/about.asp> (last visited Apr. 24, 2006).

One of the most common requests ALDF receives is for assistance with allegations of veterinary malpractice. Among its many publications is one devoted to counseling pet owners in regard to possible veterinary negligence "*If You Suspect Veterinary Malpractice*."<sup>284</sup> Other animal rights groups are increasingly using the law to implement their organizational goals as well. The Humane Society of the United States recently merged with the Fund for Animals and is hiring five new lawyers for a new litigation unit. The combined budget of HSUS/FFA is \$96 million.<sup>285</sup>

While veterinarians are integral in providing medical and surgical care for the myriad animals that animal rights groups represent, many activists nevertheless display hostility to veterinarians, particularly to the extent that veterinarians participate in food animal production and laboratory animal research. They are hardly subtle about their animal rights agenda, as exemplified in the full page advertisement in the *New York Times*, "*Has Anyone Betrayed More Animals than the AVMA?*"<sup>286</sup> The advertisement cost animal rights activists \$42,000 and was conceived by the seminal animal rights figure, Peter Singer, Ph.D., whose 1975 book, *Animal Liberation*, is considered the bible of the animal rights movement.<sup>287</sup> The advertisement focused on one of AVMA's Animal Welfare Committee members, Dr. Gregg Cutler, who was accused of ordering thousands of chickens to be thrown into a wood-chipper in a mass euthanasia.<sup>288</sup> The advertisement also referred readers to a PETA-sponsored website, AVMAHurtsAnimals.com, whose headline reads "Vets Without Hearts." The website is devoted primarily to opposing factory farming methods for raising livestock, and criticizes AVMA for its failure to oppose them as well.<sup>289</sup>

In another animal rights media effort, this one devoted to outlawing gestation stalls in pork production in a state with "just a handful of pig farms," Farm Sanctuary spent \$700,000 in televi-

284. Kenneth D. Ross & Thomas Kanyock, *If You Suspect Veterinary Malpractice*. . . , ANIMAL LEGAL DEFENSE FUND, <http://www.aldf.org/packets/malpractice.html> (last visited, Apr. 24, 2006).

285. See, e.g., Lance Gay, *Humane Society to Merge with Fund for Animals*, SCRIPPS HOWARD NEWS SERVICE, Nov. 19, 2004, available at <http://www.knoxstudio.com/shns/story.cfm?pk=HUMANE-11-19-04&cat=AN>.

286. Jennifer Fiala, *New York Times Ad Campaign Blasts AVMA*, DVM NEWSMAGAZINE, Aug. 1, 2004, available at <http://www.dvmnews.com/dvm/content/printcontentpopup.jsp>.

287. *Id.* Dr. Singer is a Professor of Philosophy at Princeton University.

288. *Id.* AVMA acquitted Dr. Cutler of wrongdoing in the incident.

289. American Veterinary Medical Association, *Vets Without Hearts*, <http://www.AVMAHurtsAnimals.com>, (last visited Apr. 24, 2006).

sion spots in Florida, winning a state-wide referendum and making Florida the first state to ban an industry-standard factory farming practice.<sup>290</sup> Florida veterinarians learned too late that animal rights organizations are “focused and funded to achieve legislative goals.” The Florida Veterinary Medical Association admitted it “didn’t have the resources to compete with Farm Sanctuary’s media blitz.”<sup>291</sup> Farm Sanctuary’s ban on swine gestation stalls was an example of animal rights organizations targeting states where enacting animal welfare laws will have little economic impact, thereby easing passage and establishing legislative precedent for future battles.<sup>292</sup> Evincing its ‘no-holds-barred’ methods, Farm Sanctuary and its co-founder personally were charged with 210 counts of violating Florida election law in winning the gestation crate ban.<sup>293</sup>

While animal rights activists used to limit themselves to loud and disruptive protesting, appearing naked in public, and throwing red paint on furs,<sup>294</sup> for some, animal activism has taken a dangerous turn into systemic campaigns of harassment, intimidation and domestic terrorism as well.<sup>295</sup> The primary groups taking responsibility for “arson, bombings, vandalism and harassment” on behalf of animals are The Animal Liberation Front (“ALF”) and Stop Huntingdon Animal Cruelty (“SHAC”).<sup>296</sup> Among its many crimes, ALF has firebombed animal research lab-

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290. Jennifer Fiala, *Animal Activism Runs Rampant Through States*, DVM NEWSMAGAZINE, Oct. 1, 2003, available at <http://www.dvmnews.com/dvm/content/printcontentpopup.jsp>.

291. *Id.*

292. *Id.* See also Patricia Leigh Brown, *Is Luxury Cruel? The Foie Gras Divide*, N.Y. TIMES, Oct. 6, 2005, at F10.

293. Brian Carnell, *Farm Sanctuary Charged With Elections Law Violations in Florida*, Oct. 29, 2002, <http://www.animalrights.net/archives/year/2002/0000334.html>.

294. Fur is Dead, *Martha Stewart Renounces Fur*, <http://www.furisdead.com> (last visited Apr. 24, 2006), (chronicling PETA’s seventeen-year anti-fur campaign, including its “I’d Rather Go Naked than Wear Fur” campaign).

295. Terry Frieden, *FBI, ATF Address Domestic Terrorism*, CNN.COM, May 19, 2005, <http://www.cnn.com/2005/US/05/19/domestic.terrorism/index.html> (“animal and environmental rights extremists have claimed credit for more than 1,200 criminal incidents since 1990”). See also Anti-Defamation League, Law Enforcement Agency Resource Network, *Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements*, [http://www.adl.org/learn/ext\\_us/Ecoterrorism.asp?LEARN\\_Cat=extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=4&item=eclo](http://www.adl.org/learn/ext_us/Ecoterrorism.asp?LEARN_Cat=extremism&LEARN_SubCat=Extremism_in_America&xpicked=4&item=eclo) (last visited Apr. 24, 2006), [hereinafter ADL].

296. *Statement of John E. Lewis to Senate Judiciary Committee Concerning Animal Rights: Activism vs. Criminality*, May 18, 2004, available at <http://www.fbi.gov/congress/congress04/lewis051804.htm>, [hereinafter *Statement of John E. Lewis*] (“[S]pecial interest extremism, as characterized by the [ALF], . . . has emerged as a serious domestic terrorist threat.”). See also ADL, *supra* note 295.

oratories at two veterinary schools (UC Davis and Michigan State), caused \$500,000 in damages after attempting to burn down a McDonald's in Tucson, and released numerous animals from research facilities.<sup>297</sup> PETA has openly supported ALF and has donated over \$45,000 for the legal defense of an ALF member who was convicted of the Michigan State firebombing.<sup>298</sup> After freeing thousands of animals from Midwestern mink farms, another ALF member recently pled guilty to two federal counts of animal enterprise terrorism ("AET")<sup>299</sup> and one state count of obtaining a false identification card used while a fugitive, and will serve two years in prison.<sup>300</sup>

SHAC has become infamous for its "multi-national campaign of harassment, intimidation and coercion" against Huntingdon Life Sciences ("HLS"), a British-based animal research laboratory, and companies or persons doing business with Huntingdon.<sup>301</sup> "SHAC-related criminal activity has [included] a pattern of vandalism, arsons, animal releases, harassing telephone calls, threats and attempts to disrupt business of not only HLS, but of all companies doing business with HLS."<sup>302</sup> As a result of SHAC's efforts, major corporations like Citibank, Merrill Lynch, HSBC and Deloitte & Touche have terminated their business relationships with Huntingdon Life Sciences.<sup>303</sup> SHAC waged a similar campaign of harassment and intimidation against California biotechnology firm Chiron on the basis of its relationships with HLS as well, exploding two pipe bombs, and threatening ominously, "can you protect the homes of every employee?"<sup>304</sup>

Law enforcement officials admit that they are severely limited in what they can do to prevent groups like ALF and SHAC from waging their campaigns of harassment and intimidation.<sup>305</sup> The Animal Enterprise Terrorism Act ("AET") "provides a framework for the prosecution of individuals involved in animal rights

297. ADL, *supra* note 295.

298. *Id.* See also Frieden, *supra* note 295 (Oklahoma Sen. James Inhofe singled out PETA for supporting extremist groups like ALF).

299. 18 U.S.C. § 43 (2005).

300. Todd Richmond, *Animal Activist Gets 2 Years in Mink Case*, ASSOCIATED PRESS, Aug. 31, 2005, available at [http://www.animalliberationpressoffice.org/media\\_coverage/2005-08-31\\_peteryoungpleads\\_washpost.htm](http://www.animalliberationpressoffice.org/media_coverage/2005-08-31_peteryoungpleads_washpost.htm).

301. *Statement of John E. Lewis, supra* note 296, See also ADL, *supra* note 295.

302. *Statement of John E. Lewis, supra* note 296.

303. ADL, *supra* note 295; *Statement of John E. Lewis, supra* note 296.

304. *Statement of John E. Lewis, supra* note 296.

305. See *id.* (stating that, where there is evidence, prosecuting for arson, burglary and explosives is not difficult).



extremism.”<sup>306</sup> Specifically, the AET applies to interstate activity that “intentionally damages or causes the loss of any property (including animals or records) used by [an] animal enterprise (or conspires to. . .).”<sup>307</sup> Violations resulting in less than \$10,000 damage can receive no more than six months imprisonment.<sup>308</sup> Violations in excess of \$10,000 damage can receive no more than three years imprisonment.<sup>309</sup> Any person who causes “serious bodily injury” can receive up to twenty years in prison.<sup>310</sup>

Although groups like ALF and SHAC have yet to target individual veterinary practitioners, they have already targeted and caused substantial property damage at two veterinary school animal research facilities.<sup>311</sup> Moreover, veterinary practitioners could do little to combat serious campaigns of harassment or intimidation were they to cross increasingly emboldened activists like those acting already in the name of ALF or SHAC. In fact, even where activists have openly targeted municipal officials like L.A.’s Director of Animal Services, throwing “military-style smoke grenades” in his house, law enforcement officials have been thus far unable to even arrest the perpetrators.<sup>312</sup>

Veterinary medicine has no reason to think that it is immune from animal rights activists. In fact, PETA and its allies have already carried out very public anti-veterinary medicine campaigns. Strengthening the AET and making it more applicable to animal rights groups’ systemic campaigns of harassment, threats and intimidation against animal industry groups should be a priority. However, the First Amendment presents a challenge in that regard, and it is also easier for lawmakers to see the threat from international terrorism than from domestic terrorism. Nevertheless, current trends of impotence on the behalf of law enforcement in regard to animal rights domestic terrorism will merely embolden activists and worsen the problem. Veterinary medicine needs to exert its influence, if not its voice, to protecting those who work with animals and prosecuting those who would harass, in-

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306. *Id.*

307. 18 U.S.C. §§ 43(a)(1)-(2) (2002). “Animal enterprise” includes a farm, laboratory, or agricultural research or testing facility, zoo, circus, rodeo, etc. *Id.* §§ 43(d)(1)(A)-(B).

308. *Id.* § 43(b)(1). Restitution is also available under the Act. *Id.* § 43(c).

309. *Id.* § 43(b)(2).

310. *Id.* § 43(b)(3).

311. See ADL, *supra* note 295.

312. Steve Hymon, *Animal Services Director Targeted; Group Says it Tossed Smoke Grenades into the Building Where Guerdon Stuckey Lives*, L.A. TIMES, Sept. 22, 2005, at B1.

timidate, burn and bomb in seeking to achieve their philosophical goals.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Veterinary medicine has found itself stuck between a rock and a hard place. That is, should veterinary medicine endorse substantial financial awards for pet owners' emotional or sentimental (non-economic) damages arising from wrongful animal loss, or should it continue to insist that pets are property and limit owners' awards to economic losses only? Moreover, should veterinary medicine embrace the growing animal law movement and ignore an increasingly impatient and aggressive animal rights movement?

Commentators in the animal law movement as well as some in veterinary medicine believe that legislative caps or judicial acquiescence to pet owners' non-economic emotional distress claims will somehow equitably remedy veterinarians' economic interest in providing medical and surgical care for animals. Unfortunately, though it is tempting to go along with those who want to recognize the financial value of the human-companion animal bond, there may be no stopping once started down that very slippery slope. Are veterinarians self-interested professional hypocrites because they exploit the value of the human-companion animal bond rather than admit that it is worth \$25,000 or \$250,000 or \$2,500,000? No, because veterinarians do not exploit that value. Comparisons of the very real and marked differences in scale between human medicine and veterinary medicine, and the services each profession provides its patients, show that there is in fact no exploitation at all. Moreover, there is no objective way to quantify that bond. Experts have testified that "if a pet is thought of as a family member by its owners, its value is whatever the owners think it is . . . [and] this value could be as high as the national debt."<sup>313</sup>

To attempt to alter animals' status as property is more precisely to attempt to alter evolution and the way society has evolved. Every year, between three and four million dogs and cats are euthanized at U.S. animal shelters.<sup>314</sup> How can anyone logi-

313. *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 690 (Iowa 1996); *See also* *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 588 n.2 (Tex. App. 2004) (pet owner sought over \$1.925 million after pet was lost while being walked after grooming and was killed by car).

314. Humane Society of the United States, *Common Questions about Animal Shelters and Animal Control*, [http://www.hsus.org/pets/animal\\_shelters](http://www.hsus.org/pets/animal_shelters) (last visited Apr. 24, 2006)

cally reconcile that when dogs and cats are unwanted they are disposable, but when they are victims of veterinary negligence they are worth thousands or even millions of dollars? Moreover, ten billion animals were fed, confined and slaughtered for food in the U.S. last year.<sup>315</sup> Why are animals that are the victims of veterinary negligence worth infinitely more than animals that are the victims of euthanasia or slaughter? Why? Because, men and women have long-ago placed that value on those animals' lives and chosen to more or less disregard any other details to the contrary. Furthermore, people buy, sell, breed and make choices about their animals' lives every day. Animals are property, and the way people care for them more than amply demonstrates that. The fact that veterinarians are professionals, specially trained and skilled in providing medical services for animals, does not in any way alter the pre-existing fact that animals are property.

Allowing pet owners substantial damage awards for animal loss does not mean that veterinarians will necessarily improve the quality of care they provide.<sup>316</sup> As human medical malpractice studies have shown, most malpractice claims do not in fact have any underlying negligence, and the negligence that admittedly exists is rarely litigated.<sup>317</sup> The one thing for certain about malpractice litigation is who profits from it – the lawyers and the legal system, taking home almost sixty cents out of every dollar spent.<sup>318</sup> Legislative non-economic damage caps and increased judicial damage awards will of course translate to higher costs for veterinarians and higher costs to pet owners. How much higher? No one really knows.

What is far more certain, though, is the effect that increased malpractice litigation will have on a profession that has already reconciled itself to charging less and doing more for its patients than its physician counterparts are able to do. With increased ex-

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(follow "Common Questions about Animal Shelter and Animal Control" hyperlink). This figure amounts to 2 to 3 % of total U.S. dogs and cats being euthanized every year because no one can give them a home (based on 164.4 million U.S. dogs and cats). See American Pet Products Manufacturers Association Inc., *Industry Statistics & Trends*, [http://www.appma.org/press\\_industrytrends.asp](http://www.appma.org/press_industrytrends.asp) (last visited Feb. 13, 2006).

315. Dena Jones, *Crimes Unseen*, ORION MAGAZINE, Jul./Aug. 2004, available at <http://oriononline.org/pages/om/04-4om/jones.html>.

316. Studdert, Mello, & Brennan, *supra* note 38, at 286 ("[T]he evidence that the [malpractice litigation] system deters medical negligence can be characterized as limited at best.").

317. *Id.* at 285 (only 17% of claims were found to involve any negligence, and only 2% of negligent injuries result in a claim of malpractice).

318. Brody, *supra* note 50.

posure to malpractice claims from non-economic damage caps, a number of veterinary practitioners will certainly leave the field, as have many physicians in response to rising malpractice awards.<sup>319</sup> The veterinary-client relationship will become increasingly strained as veterinarians come to view pet owners as “potential . . . malpractice claimants,” rather than like-minded persons who love animals and need medical assistance for them.<sup>320</sup> Even more ominous long-term for veterinary medicine and pet owners, increased malpractice exposure may result in fewer bright, young students willing to undertake four rigorous, demanding and expensive years of professional education.<sup>321</sup> How many of the best and brightest will be willing to make the financial and personal sacrifices necessary to become veterinarians, only to then subject themselves to the same “lawsuit lottery” system that their physician counterparts already undergo, albeit for much higher pay?

The American legal system is already heaving under the burden of a tort system that has become an industry fueled by windfall damage awards that only serve to encourage more unmeritorious claims.<sup>322</sup> Veterinarians must not be seduced into thinking that legislative non-economic damage caps or windfall damage awards will in any way remedy any wrongs that may have been committed by professional negligence. Despite the loud and discordant protestations to the contrary from the animal law bar, there is no societal consensus that animals need to be protected from veterinary wrongdoing. In fact, it is quite the opposite. The growth of veterinary medicine has been steady and is commensurate with public confidence in the quality of services delivered by 45,000 practicing U.S. veterinarians. Even where some in the profession have endorsed non-economic damage caps, it is hard to imagine that the rank-and-file practitioner would likewise endorse such legislation.

Unfortunately, veterinary medicine always seems to be waiting for someone else to save it from its enemies, as did Pfizer and the Animal Health Industries group when California veterinarians sought to throw themselves on the emotional distress awards

319. Rallo, *supra* note 50.

320. *Id.* at 510

321. The cost of four years of veterinary school is approximately \$150,000 to \$200,000. U.C. Davis School of Veterinary Medicine, Student Programs, Admissions Information, *Financing Your Veterinary Education: Cost of Attendance, 2005-06 Estimated Veterinary Student Expense Budgets*, available at [http://www.vetmed.ucdavis.edu/StudentPrograms/subpages/admission\\_info/cost.html](http://www.vetmed.ucdavis.edu/StudentPrograms/subpages/admission_info/cost.html) (last visited Apr. 24, 2006).

322. Huss, *supra* note 4.

bonfire. Now, thankfully again for veterinarians, the Council of State Governments has likewise intervened in seeking to prevent local and state legislators from enacting ill-advised statutes. Such statutes would dramatically increase liability for any one who provides services for animals, especially veterinarians (the most numerous deep pockets in the industry).<sup>323</sup> Veterinary medicine cannot continue to rely on big brother and sister benefactors to protect it from outside interests seeking to enrich themselves at the expense of the profession and the people and animals it serves. The animal rights and law movements are moving forward steadily and quickly. Under no circumstance can veterinary medicine do nothing or wait to see what happens.

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323. R. Scott Nolen, *State Legislators Oppose Animal Guardianship, Noneconomic Damages Laws*, J. OF THE AM. VETERINARY ASS'N, Dec. 1, 2004, available at <http://www.avma.org/onlnews/javma/dec04/041201d.asp>.